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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AIRWORK SERVICE DIVISION,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Question Presented For Review

May the New Jersey Division of Taxation, consistent with the due process clause of the Fourteenth Amendment, retroactively assess sales taxes against a New Jersey vendor based upon a changed interpretation of the law, which change was adopted without notice or an opportunity to comment in violation of the New Jersey Administrative Procedure Act?

Parties To The Proceedings

Petitioner Airwork Service Division was the plaintiff below.[1] Respondent Director of the Division of Taxation was the defendant below. Additional parties to the proceedings in the Supreme Court of New Jersey were *amicus curiae* Consumer Bureau, Inc. and the American Civil Liberties Union.

[1] Pursuant to this Court's Rule 28.1, petitioner Airwork Service Division lists the following corporate relationships: Airwork is a wholly-owned subsidiary of Purex Industries, Inc. Purex Industries, Inc. has six other wholly-owned subsidiaries: Pacific Airmotive Corporation, Prosser Industries, Inc., Baron Blakeslee, Inc., Purex Pool Products, Inc., Ellio's Pizza, Inc. and Purex Corporation. Purex Corporation, in turn, has two wholly-owned subsidiaries: TPI Corporation and Purex Export Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Reference to the Opinion Below

The decision of the Supreme Court of the State of New Jersey was filed on July 23, 1984 and is reported at 97 N.J. 290, 478 A.2d 729 (1984).[2] Plaintiff's petition for rehearing was dismissed by Order of the New Jersey Supreme Court on October 23, 1984. An Order extending the time to file this petition for certiorari until March 22, 1985 was entered January 14, 1985.

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[2] The opinion is reproduced in the appendix to this petition commencing with page 1a. The opinion of the Appellate Division of the Superior Court of New Jersey appears at 4 N.J. Tax 532 (1982) and the opinion of the New Jersey Tax Court appears at 2 N.J. Tax 329 (1979).

Jurisdictional Statement

The judgment of the New Jersey Supreme Court was entered on July 23, 1984. The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* § 1257(3) (1976), upon the ground that the Petitioner claims a right under the United States Constitution not to be deprived of its property without due process of law.

Constitutional and Statutory Provisions

The principal issue in this case is whether the retroactive assessment of a sales tax by a state agency pursuant to a rule not enacted in accordance with the state Administrative Procedure Act violates the Due Process Clause of the Fourteenth Amendment—". . . nor shall any State deprive any person of . . . property, without due process of law. . . ."

STATEMENT OF THE CASE

On December 18, 1974, the New Jersey Division of Taxation ("Division") imposed an assessment of $628,255.31 (exclusive of interest and penalties) against Airwork Service Division ("Airwork") under the Sales and Use Tax Act, *N.J.S.A.* 54:32B-1 *et seq.* ("Act"), for sales of services where the serviced property was delivered by Airwork to its customers outside New Jersey. Airwork filed a Petition of Appeal with the New Jersey Tax Court (formerly the New Jersey Division of Tax Appeals) on several grounds, including that the Division's failure to comply with the notice and comment provisions of the state Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.* ("APA"), denied Airwork due process of law under the Fourteenth Amendment with regard to the challenged sales tax assessment. Pa 1.[3] The Tax Court rejected that argument. Pa 89-90. Airwork again raised the issue in its brief to the Appellate Division, but that court affirmed the order and judgment of the Tax Court in a terse *per curiam* opinion. Pa 173.

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[3] The record below is designated by reference to the Plaintiff's Appendix ("Pa") filed with the New Jersey Supreme Court.

The issue was again briefed for the New Jersey Supreme Court, which also considered and rejected the argument that the Division's assessment represented a reversal of its prior position with regard to sales tax on serviced property delivered out-of-state and that the rule reversing that position was adopted without compliance with the notice and comment requirements of the APA, thereby violating the due process clause of the Fourteenth Amendment. Instead, the Supreme Court erroneously concluded that the basis for the Division's tax assessment did not constitute administrative rule-making, and that it was therefore not subject to the APA. 13a.

The Tax Assessment

Airwork is principally engaged in the business of repairing and overhauling aircraft engines at its place of business in Millville, New Jersey.[4] From there, the repaired engines are returned to customers, generally out of state. With regard to sales where delivery of the serviced engine is in New Jersey or where the customers are located in New Jersey, since the enactment of the New Jersey Sales and Use Tax Act in 1966 Airwork collected and remitted to the Division all sales tax due and payable for repair work. However, with respect to sales to out-of-state customers, where delivery of the serviced property is made outside New Jersey, no sales tax was collected or remitted to the state from 1966 through 1973. Affidavit of Frederick W. Becker, ¶ 3, Pa 21 (hereinafter "Becker Aff. ¶ _____").

On or about June 28, 1966, the Sales Tax Bureau of the Division released and mailed to Commerce Clearing House ("CCH") an "Official News Release" consisting of 213 official questions and answers concerning the proper interpretation of the Act. The Release was received by CCH on July 5, 1966, and was included in CCH *New Jersey State Tax Reporter*, Report

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[4]Engines are delivered from around the world, usually by shipment of the engine alone by common carrier. At times, however, delivery is accomplished by an exchange transaction in which an engine needing overhaul is removed from a customer's aircraft, and exchanged for a "loaner" engine. After overhaul, the original engine is reinstalled, and the "loaner" returned, all at Airwork's Millville plant. The taxation of the "loaner" transactions was not in issue.

162 of July 11, 1966. Affidavit of Frederick M. Lappin, ¶ 5 and Exhibits B & C, Pa 24, 30 to 64 (hereinafter "Lappin Aff. ¶ _____"). Included in the Official News Release was the following statement by the Division:

> Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser outside the State for use outside the State are exempt from the sales tax.

Pa 55. Since 1966, the Division has neither withdrawn nor amended the quoted statement from the June 28, 1966 Official News Release on which Airwork and its customers relied.

In July and August 1967, auditors from the Division examined the books and records of Airwork with respect to the application of the sales tax covering at least three separate periods of time. The auditors, consistent with the Release, did not assert any deficiency in connection with out-of-state sales. Becker Aff. ¶ 4, Pa 21.

In a publication of the Division dated August-September 1973, entitled *State Tax News* (which describes itself as a "bi-monthly newsletter of tax items of interest"), the Division, without notice or an opportunity to respond, reversed its prior position and announced that sales of services performed on goods delivered to customers outside the State were subject to the sales tax. Pa 84-85. In the next issue of the same publication, *State Tax News*, October-November 1973, the following appeared:

> *Services Performed In New Jersey*—The charges for taxable services performed in New Jersey upon tangible personal property are subject to the sales tax whether the property serviced is delivered within New Jersey or out-of-state. . . .

Once alerted by these announcements, Airwork invoiced its out-of-state customers for sales tax until the Legislature specifically exempted these transactions in 1977.

New Jersey's APA was enacted effective September 1, 1969. As noted by the Tax Court, none of the rule-making provisions of the APA, including the requirement of notice and opportunity to respond before the promulgation of rules or regulations, was followed in connection with the Division's publication of the August-September 1973 and October-November 1973 editions of the *State Tax News*. Pa 85.

In or about September 1973, the Division notified Airwork of its intention to make an assessment of sales and use tax covering the period July 1, 1970 to June 30, 1973. Because of the June 1966 news release, however, the Division later took the position that the assessment period began August 12, 1971, the date of the Division of Tax Appeal's decision in *Fisher-Stevens, Inc. v. Director, Division of Taxation*, No. S.T. 109, 114 (1971), *aff'd*, 121 N.J. Super. 513 (App. Div. 1972), *certif. denied*, 62 N.J. 575 (1973), upon which the Division relied as authority for taxing sales of services where delivery is out-of-state. Lappin Aff., Exh. D, Pa 65-67. On October 3, 1974, an assessment for unpaid taxes was made. Lappin Aff. ¶ 7 and Exh. E, Pa 25, 68-70. Following a formal protest by Airwork and an informal conference in connection therewith, a "Revised Final Determination" was issued on December 18, 1974. Lappin Aff. ¶¶ 8, 9 and Exhs. F and G, Pa 25, 71-82.

The Proceedings Below

On March 14, 1975, Airwork filed a Petition of Appeal with the former New Jersey Division of Tax Appeals, contesting this "Revised Final Determination" ("Assessment"). Pa 1. On January 24, 1980, Airwork moved for summary judgment before the Honorable David E. Crabtree, J.T.C. The Division cross-moved for summary judgment. On March 27, 1981, Judge Crabtree issued an opinion in which he upheld the imposition of the Assessment under the Act, subject to Airwork's submitting proof that imposition of the Assessment would result in duplicative taxation. Pa 83-102. For reasons set forth in a letter from Airwork's counsel to Judge Crabtree dated June 11, 1981, Pa 103-05, Airwork chose to forego that opportunity, and an Order granting summary judgment in favor of the defendant was entered on July 6, 1981. Pa 106-07. A formal Judgment of Dismissal was entered on July 22, 1981. Pa 108.

Airwork filed a timely Notice of Appeal to the Appellate Division on August 5, 1981. Pa 109-12. On April 28, 1982, the Appellate Division affirmed the decision of the Tax Court substantially for the reasons expressed by Judge Crabtree. On May 18, 1982, Airwork filed a notice of petition for certification to the New Jersey Supreme Court, which was granted on January 10, 1983. On July 23, 1984, the Supreme Court, by a vote of 4 to 3, issued an opinion affirming the decision of the Appellate Division.

The Opinions of the New Jersey Supreme Court

Justice Handler's majority opinion first addressed the issue whether the underlying transactions were subject to the sales tax under the terms of the Act and concluded that they did come within the Act.[5] Second, the majority held that principles of equitable estoppel did not prevent the collection of the sales tax from Airwork, despite the Division's having audited Airwork's books twice during the summer of 1967 and having made no attempt to collect taxes on Airwork's repair services during the early years of the sales tax. 8a-11a. Third, and most important to this Petition, the majority agreed with the Tax Court's conclusion that "the Division's tax assessment did not constitute rule-making and therefore was not subject to the APA," 11a, thus relieving the Court of the need to address the alleged due process violation.

Justice Garibaldi's strong dissent, joined by two other justices, concluded that the Division had reversed its own position and had imposed a retroactive sales tax, which offended "fundamental concepts of fairness relating to agency conduct." 14a. The dissent agreed with Airwork that the Division's action produced "an extraordinarily harsh and unfair result," 25a, in that

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[5] It is at least questionable whether New Jersey may constitutionally tax out-of-state purchasers for services performed on property which is delivered out-of-state for use outside the state. *See McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940). It is even more questionable whether an in-state vendor can be liable for a sales tax that its customers—the object of the tax—need not pay. *See Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954).

"the reversal of the rule has transformed a statutory agent for the collection of tax into a delinquent taxpayer." 23a. Noting that the New Jersey Supreme Court has recognized that constitutional due process imposes certain limits on the retroactive application of taxing statutes, *see Klebanow v. Glaser*, 80 N.J. 367, 376 (1979), 22a, the dissent concluded that the actions of the Division in this case rendered the sales tax assessment against Airwork invalid.

REASONS FOR GRANTING THE WRIT

The Decision Below Raises a Significant and Recurring Constitutional Issue Affecting the Due Process Rights of Taxpayers and the Powers of State Administrative Agencies

Preliminary Statement

Although it may appear at first that this case involves a matter of state administrative procedure better left to the interpretation of state courts, there is no doubt that fundamental federal constitutional rights are at stake that require and deserve protection. The harsh and unjust effects of the decision in this case will not be limited to a specific narrow class of taxpayers, but will be felt by all those who must interact with state administrative agencies—agencies that oftentimes assert their assumed power in circumvention of a procedural system that was implemented to promote efficient and effective government, as well as to protect the interests and rights of all citizens.

The conduct of the Division in this case clearly constituted invalid rule-making and as such violated the procedural due process rights of Airwork and all similarly-situated taxpayers. Moreover, the retroactive nature of this Assessment violates principles of fundamental fairness and offends substantive due process. *See infra*. No agency or court should be permitted to avoid the consideration and resolution of due process violations merely by manipulating the definition of rule-making such that challenged agency conduct is deemed not to fall within the APA.

The Actions of the Division Constituted Invalid Rule-Making in Violation of the APA and Deprived Petitioner of its Procedural Due Process Rights

The APA governs agency rule-making and expressly provides that no rule is valid unless adopted in substantial compliance with the notice and hearing requirements found therein. *N.J.S.A.* 52:14B-4(d).[6] There can be no doubt that the Division is a "state agency" subject to the APA. *N.J.S.A.* 52:14B-2(a); *Glaser v. Downes*, 126 N.J. Super. 10, 19 (App. Div. 1973), *certif. denied*, 64 N.J. 513 (1974). Thus, when the Division or any agency takes action that amounts to rule-making, but fails to comply with the APA, its actions are invalid and without effect. That is precisely what happened in this case and we respectfully submit that the Supreme Court erred as a matter of law in concluding otherwise.

An "administrative rule" has been defined by statute, *N.J.S.A.* 52:14B-2(e), and by case law. In *Metromedia v. Director, Division of Taxation*, 97 N.J. 313 (1984), the Court addressed the question of when a determination of the Division of Taxation imposing a tax assessment can appropriately be found to implicate agency rule-making, thereby necessitating conformity with the APA, and set forth relevant factors to be considered. *Id.* at 331-32. The *Airwork* majority purported to apply the *Metromedia* standards in reaching the conclusion that the Director's assessment "was not invalid for want of an authorizing rule or regulation." 12a. However, as to those factors that the *Airwork* majority deemed determinative, the Court's findings cannot stand as a matter of fact or law.

First, the *Airwork* majority stated that "the taxability of these services [performed by Airwork] is sufficiently clearly and directly inferable from the tax statute itself, especially in the absence of a specific exemption." 12a-13a. To the contrary, the case law and legislative history demonstrate that the Act was not

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[6] N.J.S.A. 52:14B-4(a) requires at least 30 days notice of the intended action, an opportunity afforded all interested persons to submit data, views or arguments (orally or in writing), and agency consideration of all such submissions.

intended to authorize a tax on sale of services where the serviced property is delivered, and, therefore, the sale transacted, out-of-state. See note 5 *supra*; Statement of Assembly Taxation Committee to Assembly, No. 1628; Statement of Assembly Taxation Committee to Assembly, No. 1787.

Second, the *Airwork* majority concluded that "it has not been demonstrated that the determination represents a material and significant change in administrative policy, even though for several years the taxing authority did not impose the tax. Past policy was itself equivocal, was not officially endorsed, and was not definitively settled." 13a. To the contrary, this conclusion represents an error of law because it is based on erroneous factual assumptions. As noted by Justice Garibaldi, "(t)he Division cannot seriously maintain that it never changed its interpretation of the Act." 18a (Garibaldi, J., dissenting).

In 1966 the Division issued an "Official News Release" which made clear that charges for repairs such as those performed by Airwork were exempt from the sales tax. *New Jersey St. Tax Rep.* (CCH), No. 162 (July 11, 1966). In 1967, the Division performed a tax audit of Airwork and gave no indication that Airwork's policy of not collecting sales tax from out-of-state customers was incorrect. Not until 1973 did the Division first publish two documents contradicting the Release, at which time the Division announced a "complete reversal of its prior position and announced that sales of services performed on goods delivered to customers outside the State were subject to the sales tax." 17a (Garibaldi, J., dissenting). These two documents, both of which have their source in the Division, clearly comprise "official endorsement" of a change in policy. The majority's cursory conclusion to the contrary is simply and completely unsupported.

Also unsupported is the *Airwork* majority's blanket assertion that "it seems clear that the agency action properly applies retroactively to this particular case and could be applied to similarly situated taxpayers." 13a. As Justice Garibaldi pointed out, the New Jersey Supreme Court "has recognized that constitutional due process imposes certain limits on the retroactive appli-

cation of taxing statutes." 22a (Garibaldi, J., dissenting), citing *Welch v. Henry*, 305 U.S. 134, 147 (1938) and *Klebanow v. Glaser*, 80 N.J. 367, 376 (1979). As discussed *infra*, the retroactive application of the agency rule in this case results in such hardship and unfairness that it amounts to a violation of substantive due process.[7] This Court should not allow the majority's unsupported assertion to go unchallenged given the importance of the constitutional rights involved.

Finally, while the *Metromedia* decision may add meaningfully to the jurisprudence in this area, the standards announced there must be consistently applied. Having stated a test to determine what constitutes administrative agency rulemaking, the Supreme Court must be true to that test. If it misapplies the test, to the detriment of a taxpayer's constitutional rights, the only avenue of redress left for that taxpayer is to petition this Court for relief.

The Assessment Against Airwork for Sales Tax Is Based on the Retroactive Application of a Change in the Division's Position and Violates Substantive Due Process

Airwork has consistently maintained throughout this litigation that the retroactive imposition of the sales tax under the circumstances of this case violated principles of fundamental fairness. Three justices of the Supreme Court were persuaded by this argument, agreeing in dissent that "the retroactive imposition of the sales tax produces such a harsh result that it offends fundamental concepts of fairness relating to agency conduct." 14a (Garibaldi, J., dissenting).

Based on the facts as explained *supra*, the question for the Court is whether, given the nature of the sales tax, the prior position taken by the State agency, and Airwork's understandable reliance on that announced position, imposing primary liability on Airwork for taxes it can no longer collect from its

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[7] *Amicus* American Civil Liberties Union of New Jersey argued below that the retroactive imposition of the sales tax violated Airwork's constitutional right to substantive due process under both federal and state constitutions. The New Jersey Supreme Court declined to address that issue. 13a. See note 8 *infra*.

customers produces a result so harsh and unfair as to violate substantive due process. As stated by this Court in *Welch v. Henry*, 305 U.S. 134, 147 (1938), and quoted with approval by the New Jersey Supreme Court in *Klebanow v. Glaser*, 80 N.J. 367, 376 (1979):

> In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

As to the nature of the tax, Airwork's role in the statutory scheme is a tax collector on behalf of the State. The effect of retroactive application is to allow the consumer to escape the tax, while imposing it instead on the vendor. "As such, retroactive application changes the very nature of the tax from a sales tax to be paid by the customer to a business tax to be paid by the vendor for the privilege of selling retail goods and services." 23a (Garibaldi, J., dissenting). *Cf. Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 33 n.12 (1978) (expressing concern that retroactive assessment of tax on an employer who had failed in good faith to withhold taxes for employee wages in the form of lunch reimbursement would be "almost punitive in light of the facts").

The result is even more harsh when one considers that Airwork could have avoided liability had it known that the tax was due. *See Welch v. Henry, supra*, 305 U.S. at 147. Airwork would not have failed to collect and turn over the sales tax allegedly owed by its out-of-state customers had it known or anticipated that its repairs on out-of-state property would be taxed. Indeed, once Airwork received notice in 1973 that the State intended to treat these repairs as taxable, it immediately began invoicing its out-of-state customers for sales tax. Under such circumstances, the imposition of a retroactive tax would hardly seem "consonant with justice" and would involve substantial hardship. *Untermyer v. Anderson*, 276 U.S. 440, 450 (1928) (Brandeis, J., dissenting), *quoted in Klebanow v. Glaser, supra*, 80 N.J. at 375. *Cf. Central Illinois Public Service Co. v. United*

States, 435 U.S. 21, 38 (1978) (Powell, J., concurring) ("In view of the complexities of federal taxation, fundamental fairness should prompt the Commissioner to refrain from the retroactive assessment of a tax in the absence of such notice or of clear congressional authorization.").[8]

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[8] As noted earlier, the *Airwork* majority found that the "agency action properly applies retroactively to this particular case." 13a. However, the Court never addressed the issue of retroactivity in terms of the constitutional issues asserted by Airwork and by *amicus*. 13a. The Supreme Court declined to address those arguments "in the absence of their consideration by the lower courts" and "without a sound and complete record to demonstrate their viability." 13a. While we dispute the Supreme Court's assessment of the record below and urge this Court to resolve these issues, we recognize that this Court may be reluctant to address these issues in the first instance. However, there is ample precedent to allow this Court to grant a petition for a writ of certiorari in order to remand a matter to a lower court for further consideration. *See, e.g., Wood v. Georgia*, 450 U.S. 261, 264-65 (1981). In light of the hardship and fundamental unfairness resulting from the action of the Division, as approved by the state courts, this Court should take appropriate action to redress the violations of Airwork's constitutional rights.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Court should issue a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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Dated: March 22, 1985

OPINION OF THE SUPREME COURT
OF
NEW JERSEY

AIRWORK SERVICE DIVISION, A DIVISION OF PACIFIC AIRMOTIVE CORPORATION, A CALIFORNIA CORPORATION, AND A SUBDIVISION OF PUREX CORPORATION LTD., A CALIFORNIA CORPORATION, PLAINTIFF-APPELLANT, v. DIRECTOR, DIVISION OF TAXATION, DEFENDANT-RESPONDENT.

Argued November 7, 1983—Decided July 23, 1984.

SYNOPSIS

Taxpayer engaged in business of repairing airplane engines appealed from assessment of sales tax on services sold to out-of-state customers. The Tax Court, 2 N.J. Tax 329, held the assessment valid, and taxpayer appealed. The Superior Court, Appellate Division, 4 N.J. Tax 532, affirmed. Petition for certification was granted. The Supreme Court, Handler, J., held that sales of service of repairing airplane engines to out-of-state customers was subject to the sales tax.

Affirmed.

Garibaldi, J., dissented and filed opinion in which Clifford and Pollock, JJ., joined.

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1. Taxation ⇐1246

Sale of service of repairing airplane engines to out-of-state customers was subject to state sales tax. N.J.S.A. 54:32B-2(f,i), 54:32B-8.35.

2. Statutes ⇐219(1)

Court will consider practical administrative construction of statute only when it is not satisfied that legislature's intent can-

not otherwise be determined by critical examination of purposes, policies, and language of enactment.

3. Statutes ⇦219(4)

When critical examination of purposes, policies, and language of enactment points strongly to imputation of particular legislative intent, they may not be outweighed or overcome simply by countervailing administrative practice.

4. Estoppel ⇦62.2(2)

Director of taxation was not equitably estopped from collecting sales tax on sales of service of repairing airplane engines to out-of-state customers by having failed to collect taxes during early years of the sales tax where taxpayer's reliance was claimed to be based on unofficial statements and equivocal administrative inaction.

5. Taxation ⇦1246

Assessment of sales tax on sales of service of repairing airplane engines to out-of-state customers was not invalid for want of authorizing rule or regulation where taxability of the services was sufficiently inferable from tax statute itself and where it was not demonstrated that assessment represented material and significant change in administrative policy.

Gerald C. Neary argued the cause for appellant *(Pitney, Hardin, Kipp & Szuch,* attorneys; *Gerald C. Neary* and *Jeri E. Ruscoll,* on the briefs).

Harry Haushalter, Deputy Attorney General, argued the cause for respondent *(Irwin I. Kimmelman,* Attorney General of New Jersey, attorney; *James J. Ciancia,* Assistant Attorney General, of counsel).

John W. Boyd, a member of the New Mexico bar, argued the cause for *amicus curiae* Consumer Bureau, Inc. *(Pollan and Pollan*, attorneys; *Steven E. Pollan*, of counsel and on the brief).

Robert A. Goodsell submitted a brief on behalf of *amicus curiae* American Civil Liberties Union of New Jersey *(Irwin, Post & Rosen*, attorneys.)

The opinion of the Court was delivered by

HANDLER, J.

Plaintiff, Airwork Service Division (Airwork or taxpayer) is in the business of repairing airplane engines. All repairs are made at Airwork's facilities in New Jersey, and the repaired engines are then returned to customers, generally out of state. Defendant, Director, Division of Taxation (Director) notified Airwork in September 1973 of its intention to assess it for sales tax on services rendered between July 1, 1970 and June 30, 1973, under the New Jersey Sales and Use Tax Act, *N.J.S.A.* 54:32B-1 to -29 (Act). Airwork filed an appeal of the assessment with the Division of Tax Appeals in 1975, which was later heard by the Tax Court on cross-motions for summary judgment. The Tax Court held the assessment valid, granting the Director partial summary judgment. 2 *N.J.Tax* 329 (1981). Airwork appealed and the Appellate Division affirmed. We granted the taxpayer's petition for certification. 93 *N.J.* 246 (1983.)

I

The question that we first address is whether the underlying transactions are subject to the sales tax under the terms of the Act.

N.J.S.A. 54:32B-3 imposes a sales tax on the sale of tangible personal property and on the performance of certain services. *N.J.S.A.* 54:32B-2(f). The repair of airplane engines is a service

covered by the Act. *N.J.S.A.* 54:32B-8.35. The taxpayer stresses, however, that while the repair services on these airplanes are rendered in New Jersey, the engines are later returned to out-of-state customers. It is contended that because the sale occurs at the place of delivery, the services should be deemed to have been sold or completed at the site to which the returned property is delivered. The taxpayer points to provisions of the Act that treat the sale of goods and services equivalently, *e.g., N.J.S.A.* 54:32B-2(i) (defining "vendor"). Because the Act intends to tax only sales made within New Jersey, the argument continues, the Legislature cannot have intended to tax services performed on goods to be delivered to customers in other states.

This argument is not persuasive. It assuredly does not attain constitutional dimensions. In *Evco v. Jones,* 409 U.S. 91, 93, 93 S. Ct. 349, 350, 34 L.Ed.2d 325, 328 (1972), the Court distinguished between a "tax" * * * validly imposed on the service performed in the taxing State," and "a tax levied on the gross receipts from the sales of tangible personal property in another State," holding only the latter unconstitutional. Notwithstanding that the Legislature may have treated goods and services similarly for most purposes, it is entirely possible that it recognized the difference between the place where the finished product is delivered and where services upon it are rendered, in terms of subjecting services to taxation in a case such as this. *See Fisher-Stevens, Inc, v. Director, Div. of Taxation,* 121 *N.J. Super.* 513 (App.Div.1972), certif. den., 62 *N.J.* 575 (1973).

[1] The critical issue is whether the Legislature intended to tax services such as those performed by Airwork. In looking first to the statutory language as such, we are struck by the fact that the services performed in New Jersey on goods delivered out of state are not specifically exempted from the application of the Act. *N.J.S.A.* 54:32B-3(b)(2). We have recently acknowledged, in a somewhat variant context, that such exemptions, if they are

present, must be narrowly and strictly construed and, if not clearly applicable, the underlying transaction must be amenable to the tax. *See Metpath v. Director, Div. of Taxation*, 96 *N.J.* 147 *(1984) (provision of Act exempting from tax all catalysts "that do not become a component part of finished product" is limited to chemicals used to produce tangible personal property); Tuscan Dairy Farms, Inc. v. Director, Div. of Taxation*, 4 *N.J.Tax* 92 (1982).

The Tax Court here determined that the Act's failure to include an exemption from the sales tax of services to property delivered out of state was purposeful. 2 *N.J.Tax* at 345. Such an exemption was expressly contained in the New York Sales and Compensating Use Tax Laws, § 1101 *et seq.* (McKinney 1979), which served as a model to the New Jersey Act. "Where the Legislature adopts a new law, using as a source a statute theretofore enacted in another jurisdiction, but omits a provision of the source statute, the omission is construed as being deliberate." 2 *N.J.Tax* at 346. Clearly, the rendition of services in conjunction with the delivery of products out of state is not uncommon. *E.g., Fisher-Stevens, Inc., supra*, 121 *N.J.Super.* 513. Accordingly, we adopt the Tax Court's conclusion that the Legislature purposefully chose not to exempt these services. *See Evco v. Jones, supra*, 409 *U.S.* 91, 93 *S.Ct.* 349, 34 *L.Ed.*2d 325; *see also Bank of America v. Webster*, 439 F.2d 691 (9th Cir. 1971).

The taxpayer, however, points to historical circumstance to support its contention. The Act was passed in 1966 to be effective July 1 of that year. On June 28, 1966 the Sales and Use Tax Bureau of the Division of Taxation issued a press release, containing questions and answers about the Act, that was published on July 11, 1966, in a commercial tax news service—Report 162 of the Commerce Clearing House *New Jersey Tax Reports*. The press release included the following statement:

Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser outside the State for use outside the State are exempt from the sales tax.

Airwork claims that this published statement is equated with an official policy adopted by the Division of Taxation. Nevertheless, the issue of the taxability of services performed for out-of-state customers was being actively litigated. It was—or should have been—well known to similarly situated taxpayers that the Division of Taxation was vigorously taking the position that such services were taxable. The issue was finally resolved in 1972 by the decision of the Appellate Division in *Fisher-Stevens, Inc., supra,* 121 *N.J.Super.* 513, affirming the 1971 determination of the Division of Tax Appeals, Docket S.T. 109, which held that a company providing direct mailing services in New Jersey with materials sent chiefly to addresses in other states on behalf of out-of-state customers was subject to the sales tax for the services performed in New Jersey.

The taxpayer further notes that following the enactment of the statute, the Legislature failed to object to the Division's "position," ostensibly appearing in the 1966 press release. Airwork draws the conclusion that the Division's policy therefore met with legislative approval and conformed to the Legislature's intent. In general, the legislative attitude towards enacted legislation is a marginal tool of interpretation, even under the most propitious circumstances. 2A *Sutherland, Statutory Construction* § 48.06 (4th ed. 1972). The generally limited usefulness of coupling administrative practice with legislative inaction to extrapolate legislative intent is further reduced when the agency attitude itself is unofficial and equivocal. As the Division points out, the earlier press release was never officially approved or even authenticated as an official pronouncement. Further, to the extent there were any officially endorsed statements on this subject matter, these were set forth in the general instructions accompanying the official tax returns. The instruc-

tions did not authorize or permit the exclusion of services performed on goods delivered outside New Jersey. Moreover, following its successful litigation of the issue in 1972, the Division affirmatively sought to dispel the possible confusion generated by the earlier press release by specifically stating, in two separate issues of *State Tax News*, a bi-monthly newsletter published by the Division itself, that the sales tax did apply to repair services performed in New Jersey, regardless of where the repaired property was to be delivered.

[2,3] We note that courts have acknowledged that "the practical administrative construction of a statute over a period of years without interference by the Legislature is evidence of its conformity with the legislative intent and should be given great weight by the courts." *Automatic Merchandising Council v. Glaser*, 127 *N.J.Super.* 413, 420 (App.Div.1974) (interpreting Sales and Use Tax Act); *see Malone v. Fender*, 80 *N.J.* 129 (1979). Nevertheless, the court will consider this factor only when it is not satisfied that the Legislature's intent cannot otherwise be determined by a critical examination of the purposes, policies, and language of the enactment. When such circumstances point strongly to the imputation of a particular legislative intent, they may not be outweighed or overcome simply by a countervailing administrative practice. *See Fedders Corp. v. Director, Div. of Taxation*, 96 *N.J.* 376 (1984) (language, purpose, and policy of "indebtedness" clause in New Jersey Corporation Business Tax Act evidenced legislative intent to exclude *bona fide* debt owed to affiliated corporation, notwithstanding contrary administrative interpretation that was itself confirmed by administrative rule and longstanding, uniform agency practice); *Mobay Corp. v. Director, Div. of Taxation*, 96 *N.J.* 407 (1984) (same).

We conclude, therefore, that the Act authorizes the imposition of a sales tax on the performance of services rendered in the state on goods to be delivered to customers outside the State.

II

[4] The Division made no attempt to collect taxes on taxpayer's repair work during the early years of the sales tax, despite its having audited plaintiff's books during the summer of 1967. Because the taxpayer assertedly relied on the Division's previous position, it argues that the tax assessment against it is improper.

This argument is analogous to one based on principles of equitable estoppel. In *New Jersey Turnpike Auth. v. Washington Tp.*, 137 *N.J.Super.* 543, 552 (App.Div.1975), aff'd o.b., 73 *N.J.* 180 (1977), the court remarked that "the application of principles of estoppel [is] particularly inappropriate where the collection of taxes by a public body is involved, except in unusual circumstances." *See also Bayonne v. Murphy & Perrett Co.*, 7 *N.J.* 298 (1951)(taxing authority is not bound or estopped by unauthorized acts of its officers). In *Skulski v. Nolan*, 68 *N.J.* 179, 198 (1975), this Court recognized that "the concept of estoppel is not applied as readily against the public as against private persons." *Id.; see Zigmont v. Bd. of Trustees, Teachers' Pension & Annuity Fund*, 91 *N.J.* 580 (1983). The issue thus becomes whether the circumstances of this case warrant the unusual remedy of estopping the government from collecting taxes because the taxpayer has assertedly relied on earlier statements by the taxing authority.

A number of cases in other jurisdictions have refused to allow an estoppel against a taxing authority. *E.g., Crane Co. v. Arizona State Tax Comm'n*, 63 *Ariz.* 426, 163 *P.*2d 656 (1945), overruled on other grounds *sub nom. Duhame v. State Tax Comm'n*, 65 *Ariz.* 268, 179 *P.*2d 252(1947); *Market Street Ry. Co. v. California State Bd. of Equalization*, 137 *Cal.App.* 2d 87, 290 *P.*2d 20 (Dist.Ct.App.1955); *La Societe Francaise v. California Employment Comm.*, 56 *Cal.App.*2d 534, 133 *P.*2d 47 (Dist.Ct.App.1943). The application of this equitable doc-

trine is extremely fact-sensitive. The Division stresses that Airwork has not demonstrated actual or reasonable reliance on any definitive official conduct on the part of the Division. As noted, no express exemption is provided by the Act itself. The press release, published in a private, commercial tax news service, was not shown to be an official statement or pronouncement. In addition, according to the Division, that release contained inaccuracies and outdated information, suggesting a lack of reliability. *See Iowa Movers & Warehousemen's Ass'n v. Briggs,* 237 *N.W.*2d 759 (Iowa 1976) (taxing authority not estopped from imposing tax contrary to past enforcement policy when taxpayer failed to prove actual reliance); *see also Dixon v. United States,* 381 *U.S.* 68, 72–73, 85 *S.Ct.* 1301, 1304–1305, 14 *L.Ed.*2d 223, 227 (1965) (Commissioner may retroactively correct mistakes of law in application of tax laws to particular transactions, even where taxpayer may have relied to his detriment on past practice). Also, the Division, in active litigation, asserted the taxability of such transactions. *Fisher-Stevens, Inc., supra,* 121 *N.J.Super.* 513. Moreover, the official instructions accompanying the sales tax returns did not mention or recognize any exemption for services provided out-of-state customers.

Both Airwork and *amicus* Consumer Bureau, Inc., rely on cases from other jurisdictions in which courts have not permitted taxing authorities to change or modify their position. However, many of these cases involve the power to apply new regulations retroactively, *see, e.g., Illinois Bell Tel. Co. v. Allphin,* 95 *Ill.App.*3d 115, 50 *Ill.Dec.* 739, 419 *N.E.*2d 1188 (1981); *Appeal of Denman,* 120 *N.H.* 568, 419 *A.*2d 1084 (1980); *Department of Revenue v. Family Hosp., Inc.,* 105 *Wis.*2d 250, 313 *N.W.*2d 828 (1982); *Hercules Powder Co. v. State Bd. of Equalization,* 66 *Wyo.* 268, 208 *P.*2d 1096 (1949), reh'g denied, 66 *Wyo.* 309, 210 *P.*2d 824 (1948). The instant case appears to involve the converse situation, namely, the application of the controverted tax to cover previous tax years is in accord with the

enabling tax statute, consistent state fiscal concerns, and legislative policy.

The Legislature presumably has been long aware of the issues implicated in the taxability of services performed for out-of-state customers. In 1974, the Legislature passed A. 1628, designed to exempt from taxation repair work on tangible property delivered to out-of-state customers. This bill was vetoed by the Governor, whose veto message explained:

> I strongly believe that such an amendment would represent a substantial and excellent step forward in reforming the present business tax structure that now plagues the economy of this State. However, I cannot overlook the fact that enactment of such an amendment may result in the loss of approximately $5 million in tax revenue for the State. During this time of fiscal crisis, it would be irresponsible for me to allow such an amendment to become law without having the ability to recoup the loss through another revenue raising device.

A similar bill was finally enacted in 1977. *L.*1977, *c.* 54, *N.J.S.A.* 54:32B-3(b)(5) (as amended). The committee statements accompanying both bills reflect legislative disapproval of a tax on such services, as it would impose hardship on New Jersey businesses, some of which may have relied on the Division's earlier failure to impose the tax. It is more significant, however, that in enacting *L.*1977, *c.* 54, the Legislature itself did not choose to apply the statutory exemption retroactively. Further, the Governor's veto in 1974 of previous legislation reinforces the policy that a retroactive recognition of the exemption for such services would be contrary to public policy.

Other states have announced a *per se* rule against estopping the government from collecting taxes. *See, e.g., State v. Maddox Tractor & Equip. Co.*, 260 *Ala.* 136, 69 *So.*2d 426 (1953); *Claiborne Sales Co., Inc. v. Collector of Revenue*, 233 *La.* 1061, 99 *So.*2d 345 (1957); *Henderson v. Gill*, 229 *N.C.* 313, 49 *S.E.*2d 754 (1948)(in collection of sales tax, error of an administrator should not serve to redistribute tax burden as imposed by

the Legislature). We conclude, under the circumstances of this case, that when a sales tax statute specifically provides for the taxation of particular transactions and does not explicitly provide for the tax exemption of such transactions, estoppel should not generally be available to a subject taxpaper. The strong public and governmental interest in the collection of the tax imposed by the Legislature will usually outweigh the asserted reliance by a taxpayer, especially when such reliance is claimed to be based on unofficial statements and equivocal administrative inaction.

In summary, we hold that principles of equitable estoppel or similar considerations do not prevent the collection of the sales taxes against the taxpayer as determined by the Director.

III

[5] Airwork argues that before changing its position, the Division was obliged to follow the procedures of the Administrative Procedure Act (APA), *N.J.S.A.* 52:14B-1 to 1-15, governing the promulgation of administrative rules. The Tax Court concluded, however, that the Division's tax assessment did not constitute rule-making and therefore was not subject to the APA. 2 *N.J.Tax* at 340-41. While *N.J.S.A.* 54:32B-24(1) gives the Division the power to make rules, the Director, under *N.J.S.A.* 54:32B.-24(6), has the power "[t]o assess, determine, revise and readjust the taxes imposed by this act." The Tax Court held that in assessing the tax against Airwork, the Division was acting pursuant to this power. The Appelllate Division affirmed the Tax Court. We agree.

N.J.S.A. 52:14B-2(e) defines an administrative agency "rule" as follows:

> "Administrative rule" or "rule," when not otherwise modified, means each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the

amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) intraagency and interagency statements; and (3) agency decisions and findings in contested cases.

If an agency determination or action constitutes an "adminstrative rule," then its validity requires compliance with the specific procedures of the APA that control the promulgation of rules. *Metromedia v. Director, Div. of Taxation*, 97 *N.J.* 313 (1984).

We have considered the question of when a determination of the Division of Taxation imposing a tax assessment can appropriately be found to implicate agency rule-making, thereby necessitating conformity with the APA. We stated in *Metromedia v. Director, Div. of Taxation*, decided today:

> [A]n agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication.
> [96 *N.J.* at 331.]

In this case, applying the *Metromedia* standards, we are satisfied that the Director's assessment was not invalid for want of an authorizing rule or regulation. Here, the taxability of these services is sufficiently clearly and directly inferable from the tax

statute itself, especially in the absence of a specific exemption. See discussion, *supra* 320-323. Further, it has not been demonstrated that the determination represents a material and significant change in adminstrative policy, even though for several years the taxing authority did not impose the tax. Past policy was itself equivocal, was not officially endorsed, and was not definitively settled. Further, it seems clear that the agency action properly applies retroactively to this particular case and could be applied to similarly situated taxpayers. Finally, the broad fact-finding and informational procedures typical of rule making are not warranted in this case in order to buttress the soundness of the determination or to assure fairness to individual litigants. In terms of the actual assessment, Airwork had every opportunity to challenge with countervailing proofs the application of the tax. Each taxpayer to whom the tax is sought to be imposed will similarly be free to contest the application of the tax to its operations. Accordingly, we conclude that the Director had the authority in this case to proceed by way of adjudication.

IV

We acknowledge that constitutional issues have been asserted at various stages of this litigation, some by the taxpayer and some by *amicus*. These issues were not determined by the courts below. We note these issues, but in the absence of their consideration by the lower courts, and without a sound and complete record to demonstrate their viability, decline to address them.[1] The taxpayer also argues that the assessment applies only to the cost of labor, not to the cost of parts. This issue, however, was raised for the first time on appeal, and the Appellate Divi-

[1]The taxpayer asserts that goods sold and delivered to out-of-state customers are immune from taxation under the federal Commerce Clause. It also makes an equal protection argument along these lines, questioning the rationality of such a distinction. *Amicus* American Civil Liberties Union of New Jersey argues that the retroacive imposition of the sales tax violates plaintiff's constitutional right to substantive due process under both federal and State constitutions.

sion declined to consider it. We similarly decline to deal with this issue, recognizing that the taxpayer may pursue this as well as its constitutional claims before an appropriate tribunal if it chooses to do so.

In conclusion, we hold that the tax assessment imposed on the taxpayer in this case is in accordance with the terms of the Act; it was permissibly imposed on transactions for the years involved; and it does not in the circumstances presented constitute invalid rule-making.

Accordingly, the judgment below is affirmed.

GARIBALDI, J., dissenting.

It is the part of a good shepherd to shear the flock, not flay it. [Tiberius Caesar, A.D. 25.]

Justice Frankfurter once noted that "[e]ven tax administration does not as a matter of principle preclude considerations of fairness." *Angelus Milling Co. v. Comm'r of Internal Revenue*, 325 *U.S.* 293, 297, 65 *S.Ct.* 1162, 1165, 89 *L.Ed.* 1619, 1623 (1945). Today's decision loses sight of the need for fairness. It allows the Division of Taxation (Division), long after the transactions in question were closed, to extract from Airwork Service Division (Airwork) sales taxes that the Division itself informed Airwork it should refrain from collecting from its out-of-state customers. The Division has been able to accomplish this apparently draconian result by successfully arguing that Airwork should never have relied on its information in the first place.

Given the prior published position of the Division, Airwork's understandable reliance on that announced position, the nature of the sales tax, and Airwork's current inability to collect the sales taxes, the retroactive imposition of the sales tax produces such a harsh result that it offends fundamental concepts of fairness relating to agency conduct. I believe that an agency may not reverse itself retroactively when doing so will

cause extraordinary detriment to those who have relied in good faith on the agency's prior position. Further, as the imposition of sales tax here allows the state to revise its earlier publicized position without first providing a taxpayer with notice of the change, it violates the Administrative Procedure Act (APA), *N.J.S.A.* 52:14B-1 to -15, governing the promulgation of administrative rules. Hence, I disagree with the majority, and would hold the sales-tax assessment invalid.

I

Administrative agencies need flexibility to exercise their executive role through rulemaking and adjudication so that they may effectuate public policy. *See In re Kallen*, 92 *N.J.* 14, 24–25 (1983). As a result, they have great discretion in selecting the form of proceeding best suited to achieving their aims. *See In re Uniform Admin. Procedure Rules*, 90 *N.J.* 85, 92 (1982); *Texter v. Department of Human Servs.*, 88 *N.J.* 376, 383–84 (1982); *Bally Mfg. Corp. v. New Jersey Casino Control Comm'n*, 85 *N.J.* 325, 338 (1981) (Handler, J., concurring).

This discretion is not unlimited, however. This Court has not hesitated to apply principles of fundamental fairness, beyond those required by the Constitution, to administrative agency actions. *See In re Arndt*, 67 *N.J.* 432 (1975); *Monks v. New Jersey State Parole Bd.*, 58 *N.J.* 238 (1971); *cf. State v. Tropea*, 78 *N.J.* 309, 315-16 (1978) (although retrial of charge of speeding was not barred by Constitution, "considerations of fundamental fairness" militated against retrial when it would merely afford the State another opportunity to produce evidence of the applicable speed limit that the State had failed to produce originally); *Rodriguez v. Rosenblatt*, 58 *N.J.* 281, 294-95 (1971) ("considerations of fairness" dictated that counsel be provided to indigents charged in municipal courts with disorderly persons or other petty offenses). "When specific parties are

particularly affected by a proposed rule, fair play and administrative due process dictate that an agency must conscientiously concern itself with and make reasonable efforts to accommodate the rights and interests of the affected individual and genuinely account for the individualized effect of its proposed action." *Bally Mfg. Corp. v. N.J. Casino Control Comm'n, supra,* 85 *N.J.* at 345 (Handler, J., concurring).

"[T]here are no simple answers as to what constitutes fundamental fairness" and "[e]ach case must be considered and evaluated on its own merits". *In re Kallen, supra,* 92 *N.J.* at 27. The determination of whether agencies have observed principles of basic fairness therefore requires "an examination of the facts in each case, giving weight to the effect of the decision on the agency's public policy." *Id.* at 26. My review of this case clearly establishes that the retroactive imposition of the sales tax on Airwork would be harsh and unfair.

Airwork had no reason to believe it was not conforming to the Division's policy. In 1966, after the passage of the New Jersey Sales and Use Tax Act, *L.*1966, *c.* 30, § 1(Act), the Sales Tax Bureau of the Division issued an "Official News Release" (Release), *New Jersey Tax Rptr. (CCH),* No. 162, (July 11, 1966), stating *inter alia:*

> Charges for repairs where the articles upon which the work is performed are delivered upon completion, pursuant to contract, to a purchaser outside the state for use outside the state are exempt from the sales tax.

The Division never adopted formal regulations governing this specific issue. Thus the Release, continuously printed, was the only statement on the topic for seven years.

In reliance on the Release, Airwork, which is principally engaged in the business of repairing aircraft engines, did not collect sales tax from its out-of-state customers. It did collect sales tax from its New Jersey customers. From Airwork's point of view, a 1967 tax audit confirmed the viability of this position.

During its 1967 audit of Airwork, the Division concluded that Airwork's policy of not collecting sales tax from its out-of-state customers was correct. Although neither the Release nor the audit bars the Division from changing its policy, they do raise questions about the fundamental fairness of changing a policy without at least giving a taxpayer notice of that change.

On August 12, 1971, the Division of Tax Appeals promulgated its decision in *Fisher-Stevens Inc. v. Director, Div. of Taxation,* Docket S.T. 109, aff'd, 121 *N.J.Super.* 513 (App.Div.1972), certif. den., 62 *N.J.* 575 (1973). Two years after the Division of Tax Appeals decision in *Fisher-Stevens,* and only *after* the Appellate Division's decision in *Fisher-Stevens,* the Division first published a document contradicting the Release. In its August-September 1973 edition of *State Tax News,* a bi-monthly newsletter of tax items of interest, the Division announced a complete reversal of its prior position and announced that sales of service performed on goods delivered to customers outside the State were subject to the sales tax. The next issue of *State Tax News,* the October-November 1973 issue, contained the following:

> *Service Performed in New Jersey*—The charges for taxable services performed in New Jersey upon tangible personal property are subject to the sales tax whether the property serviced is delivered within New Jersey or out-of-state * * *.

Although the APA, *N.J.S.A.* 52:14B-1 to -15, was in effect as of September 1, 1969, *see L.*1968, *c.* 410, § 1, none of the rule-making procedures was followed in connection with the Division's publications in the August-September 1973 and October-November 1973 editions of the *State Tax News.* Once alerted by these announcements, Airwork commenced collecting sales tax from its out-of-state customers until the Legislature specifically exempted those customers from the sales tax in 1977. See *L.*1977, *c.* 54.

After publication of these announcements, the Division notified Airwork of its intention to assess sales and use tax for the period from July 1, 1970 to June 30, 1973. Because of the Release, however, the Division later took the position that the assessment period began August 12, 1971, the date of the Division of Tax Appeals' decision in *Fisher-Stevens, Inc. v. Director, Division of Taxation, supra,* Docket S.T. 109. The assessment was for $628,255.31.

II

The Division cannot seriously maintain that it never changed its interpretation of the Act. The Division's lack of claim for sales tax for the period prior to the decision of the Division of Tax Appeals in *Fisher-Stevens* is itself acknowledgment that a change has occurred, as are its subsequent releases in 1973. Moreover, various statements by the Legislature concerning amendments to the Act recognize that a change in interpretation occurred.

In 1974, the Legislature passed a bill, later vetoed by the Governor for revenue reasons, that would have exempted the transactions at issue from the sales tax. The Assembly Committee on Taxation Statement to this bill provided, in relevant part:

> The committee has acted favorably on Assembly Bill No. 1628 in that it believes the bill serves to remove an inequitable situation, *and further, it is in keeping with the original interpretation of the Sales Tax Act which subsequently was changed.*
>
> * * * * * * * *
>
> *As noted during the first 6 or 7 years of the life of the act there would have been no sales tax, but several years ago, the interpretation was changed and the tax imposed.* In effect, this bill will return the situation to its original status.
>
> [Emphasis added]

Those "first 6 or 7 years" were the years from 1966 to 1972 or 1973. Thus, not only did the Legislature perceive a change but, like Airwork, it perceived that change as occurring in 1973.

Similarly, the Assembly Committee on Taxation Statement to A.1787 (1977), a bill which also exempted these transactions from sales tax, stated in relevant part:

> The bill proposes to exempt from the sales tax services provided by New Jersey companies on tangible personal property delivered out of state. Because New Jersey is the only State, with the possible exception of New Mexico, that imposes a sales tax on such transactions, it places New Jersey businesses at a considerable disadvantage in maintaining such operations.
>
> *The imposition of the tax is one which did not occur in the beginning years of the sales tax, but was imposed by interpretation later.* Such taxes, when assessed against New Jersey businesses, in many instances incur a loss because they are unable to collect from customers after the fact.
>
> [Emphasis added.]

This bill became law in 1977. *L.*1977, *c.* 54. Since 1977, the services in question have been exempt from the sales tax.

III

The Division relies on the decision of the Division of Tax Appeals in *Fisher-Stevens* as notice of its new revised policy that sales tax is due on sales of services when delivery of the tangible personal property is out-of-state. It is difficult to see how an agency decision that is not on point and was never officially reported can constitute notice of a change in policy.

Fisher-Stevens cannot by any stretch of the imagination be said to address the application of sales tax to the services at issue in this case. In *Fisher-Stevens* the court held that services performed and delivered in New Jersey were taxable. There was

nothing novel in this approach. From the transcript of the *Fisher-Stevens* trial, it is evident that the Division's policy was not to tax the services if the finished items rather than being mailed from New Jersey were instead shipped out of the state for mailing by the customer. This policy of course reflects the exemption Airwork claims existed. To contend that Airwork somehow should have read *Fisher-Stevens* and, having digested it, should have determined that the court's language, in which it held that the "use" of direct mail services occurred entirely within this state, actually meant that the rebuilding of nonresidents' aircraft engines for use outside the state was no longer exempt from the state sales tax is beyond belief. Moreover, this expectation is even less realistic when, as here, published, official statements were made by the Division that clearly stated that the sales tax should not be collected for repair charges on articles that were to be delivered and used out of state.

Further, *Fisher-Stevens*, was not even an opinion of a court. The decision of the Division of Tax Appeals was a decision of an administrative agency. Thus, many of the opinions of the Division of Tax Appeals were never published. Those opinions that were published were not published in official reporters such as the present *New Jersey Tax Court Reports*. Unless the Division of Tax Appeals specifically granted a taxpayer's request to receive all copies of its opinions, a taxpayer could not possibly become familiar with all its opinions. Even if a taxpayer made such a request, of course, it is not clear it would be granted.

New Jersey courts have recognized these problems even with respect to reported court opinions. In *Glaser v. Downes*, 120 *N.J.Super.* 476, 491-92 (Ch.Div.1972), rev'd in part, 126 *N.J.Super.* 10 (App.Div.1973), certif. den., 64 *N.J.* 513 (1974), the trial court ruled that the gasoline service-station practice of giving free gifts for merely coming into a station was illegal. The court recognized, however, that it would be unfair to enforce *its*

decision without first giving effective notice to service stations that had been acting in reliance on the Division of Taxation's prior practice of not treating such gifts as illegal and held that:

> [T]he Director must give gasoline retailers throughout the State *ample written notice* of the illegality of each of these competitive devices. I leave to his discretion whether he takes this action by the adoption of appropriate regulations or the giving in some fashion of adequate written notice to all of the gasoline retailers operating in this State of the conclusions reached in this opinion. [*Id.* 120 *N.J.Super.* at 492 (emphasis added).]

The Appellate Division in *Glaser v. Downes, supra,* 126 *N.J.Super.* 18-19, went even further, holding that merely mailing notices to all licensed retail motor fuel dealers was inadequate. If the Director was going to change his prior position and treat the giveaways as illegal, he had to adopt regulations to that effect, and do so in the manner prescribed by the APA, especially policy previously followed by the Division of not treating such giveaways as illegal. *Id.* at 18. After ruling that the Director had to comply with the APA, the court concluded that "[w]hat he did denied due process of law to the three companines * * * involved." *Id.* at 19.

As a practical matter, allowing unreported decisions of administrative agencies to provide sufficient notice of an agency's changed position imposes an intolerable burden on the taxpayer. In addition to regularly checking regulations and Division releases, businessmen would have to meticulously check an agency's decisions, many of which are unreported, for cases that might possibly affect them. Requiring businesses to check for these decisions is a useless waste of time, energy, and money. It would be much simpler, more logical, and more efficient for the Division to simply amend an existing release or promulgate a new regulation when a case causes it to change its policy. This would adequately serve notice to taxpayers of changes in policy and comport with due process.

I recognize that the Division, with the best of intentions, issues releases informally to aid taxpayers in complying with the new tax after the enactment of a new tax statute. Nevertheless, once such a release on a specific topic is set forth, I believe that it is only fair that a change of position similarly be set forth in a notice. The Division can easily and inexpensively satisfy fairness concerns by merely issuing a new release as it later did in *State Tax News*. Such a release would have provided adequate notice to Airwork to collect sales tax from its out-of-state customers. The cost to the state of such a notice would have been minimal. Thus, to the extent that administrative costs or effects on the efficient operation of government may be legitimate concerns in assessing what process is due in any case, *see Mathews v. Eldridge*, 424 *U.S.* 319, 335, 96 *S.Ct.* 893, 903, 47 *L.Ed.*2d 18, 33 (1976), such concern is easily satisfied here.

I would hold, therefore, that Airwork first received sufficient notice of the Division's change of policy in 1973 when the change was announced in issues of *State Tax News*.

IV

If Airwork did not receive sufficient notice of change in policy until 1973, then the Division's assessment of sales tax prior to that date is retroactive. This Court has recognized that constitutional due process imposes certain limits on the retroactive application of taxing statutes. *See Klebanow v. Glaser*, 80 *N.J.* 367 (1979). As stated by the Supreme Court in *Welch v. Henry*, 305 *U.S.* 134, 147, 59 *S.Ct.* 121, 125, 83 *L.Ed.* 87, 98 (1938), and quoted with approval by this Court in *Klebanow, supra*, 80 *N.J.* at 376:

> In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

Or, stated another way:

> The need of the government for revenue has hitherto been deemed a sufficient justification for making a tax measure retroactive whenever the imposition seemed consonant with justice and the conditions were not such as would ordinarily involve hardship. [*Id.* at 375 (quoting with approval *Untermyer v. Anderson*, 276 *U.S.* 440, 450, 48 *S.Ct.* 353, 356, 72 *L.Ed.* 645, 649 (1928)) (Brandeis, J., dissenting).]

The hardship that exacerbates the unfairness of retroactive application of the agency rule here is that the reversal of the rule has transformed a statutory agent for the collection of tax into a delinquent taxpayer. *Cf. Central Ill. Pub. Serv. Co. v. United States*, 435 *U.S.* 21, 33 n. 12, 98 *S.Ct.* 917, 923 n. 12. 55 *L.Ed.*2d 82, 91 n. 12 (1978) (expressing concern that retroactive assessment of tax on an employer who had failed in good faith to withhold taxes for employee wages in the form of lunch reimbursement would be "almost punitive in light of the facts"). Although personally liable for the taxes required to be collected under the Sales and Use Tax, *N.J.S.A.* 54:32B-14, Airwork's role in the statutory scheme is as *tax collector* on behalf of the state of New Jersey. *See N.J.S.A.* 54:32B-12. It was in this capacity that Airwork, and others similarly situated, were advised by the Division not to collect the sales tax on services performed for out-of-state customers. The effect of retroactive application is to allow the consumer to escape the tax, while imposing it instead on the vendor. As such, retroactive application changes the very nature of the tax from a sales tax to be paid by the customer to a business tax to be paid by the vendor for the privilege of selling retail goods and services. The vendor can no longer collect the tax from the customer after the transaction has been completed, yet retroactive application *first* imposes the tax *after* the transaction has occurred.

The hardship is particularly worthy of note when the taxpayer could have been expected to refrain from the conduct that created his tax liability had he anticipated the tax. *See Welch v.*

Henry, supra, 305 *U.S.* at 147, 59 *S.Ct.* at 125, 83 *L.Ed.* at 93; *Pressed Steel Car Co. v. Lyons,* 7 *Ill.*2d 95, 105–06, 129 *N.E.*2d 765, 770–71 (1955); *Hercules Powder Co. v. State Bd. of Equalization,* 66 *Wyo.* 268, 306, 208 *P.*2d 1096, 1112, reh'g denied, 66 *Wyo.* 309, 210 *P.*2d 824 (1948); *cf. In re Kaplan,* 178 *N.J.Super.* 487, 496 (App.Div.1981) (notions of fundamental fairness impaired in action to retroactively enforce Medicaid anti-fraud provision in part because had appellant been able to anticipate the statute "it seems likely that appellant would have altered his conduct"). Here the conduct that created Airwork's liability was its failure to collect and pay to the state the sales tax. That conduct surely would have been avoided by Airwork had it known or anticipated that its repairs on out-of-state property would be taxed. Simply stated, had Airwork known that the state would treat such repairs as taxable, it would have collected the tax from its out-of-state customers. Indeed, once Airwork received notice in 1973 that the state would treat these repairs as taxable, it immediately began collecting the tax from its out-of-state customers.

V

Today in *Metromedia, Inc. v. Director, Div. of Taxation,* 97 *N.J.* 313 (1984), we held that the Division's decision to apply the audience share factor in allocating taxpayer's receipts to New Jersey was tantamount to an agency rule and consequently had to be promulgated in accordance with the APA. In that opinion, we stated:

> Similarly, an agency determination can be regarded as a "rule" when it effects a material change in existing law. *See Crema [v. New Jersey Dept. of Environmental Protection], supra, 94 N.J.*[286]at 302; K.C. Davis, *Administrative Law Treatise* § 7:25 at 186 (2d ed. Supp.1982); *Ford Motor Co. v. Fed. Trade Comm'n,* 673 F.2d 1008, 1009 (9th Cir.1981), *cert.* den., [459] *U.S.* [999, 103 *S.Ct.* 358], 74 *L.Ed.*2d 394 (1982) (an agency determination that changes existing law and has widespread application must be addressed by rule-making and not adjudication). This

feature relates not only to fairness to the individual party actually before the agency but to other persons as well. When an agency's determination alters the *status quo*, persons who are intended to be reached by the finding, and those who will be affected by its future application, should have the opportunity to be heard and to participate in the formulation of the ultimate determination. *See Bergen County Pines Hosp. [v. Dept. of Human Services], supra*, [96] *N.J.* [456]; *Crema, supra*, 94 *N.J.* at 303; *Boller Beverages, Inc. [v. Davis], supra*, 38 *N.J.* [138] at 151. [Id. at 330.]

We further held that one of the factors determining whether an agency determination must be considered an administrative rule is whether it "reflects an administrative policy that * * * constitutes a material and significant change from a clear, past agency position on the identical subject matter." *Id.* at 331.

I disagree with the majority and believe that based on the totality of circumstances in this case, it is clear that the policy announced in 1973 in the *State Tax News* constituted a material and significant change from the prior policy of the Division as stated in its Release. This conclusion is confirmed by the Division's audit of Airwork, is reflected in its failure to assess taxes for the entire period, and is affirmed by the Legislature's statements.

Both the Tax Court and the majority assume that Airwork is contesting the right of the Division initially to make such a ruling under its assessment power. I am not. I am however, claiming that once such a ruling is made, it may not be changed without notice to the affected public. Particularly in a case like this that transforms Airwork from the role of tax collector to that of primary taxpayer, lack of notice produces an extraordinarily harsh and unfair result.

Accordingly, I would hold under the APA that Airwork was entitled to notice of the Division's changed position set forth in its 1973 Release. Since the Division failed to give notice, it vio-

lated the procedures under the APA and I would hold its assessment invalid.

For affirmance—Chief Justice WILENTZ and Justices SCHREIBER, HANDLER and O'HERN—4.

For Reversal—CLIFFORD, POLLOCK and GARIBALDI—3.

Office - Supreme Court, U.S.
FILED
APR 3 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1506

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AIRWORK SERVICE DIVISION,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

SUPPLEMENTAL APPENDIX

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Supreme Court of New Jersey

M-189 SEPTEMBER TERM, 1984
19,918

ORDER

AIRWORK SERVICE DIVISION,
Petitioner,
vs.
DIRECTOR, DIVISION OF TAXATION,
Respondent.

FILED
OCT 25 1984
Stephen W. Townsend
CLERK

No member who voted with the majority having moved the matter, the petition for rehearing is dismissed as moot.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 23rd day of October, 1984.

Stephen W. Townsend

CLERK OF THE SUPREME COURT

Supreme Court of the United States

NO. A-538

AIRWORK SERVICE DIVISION,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 22, 1985.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States

AIRWORK SERVICE DIVISION, A DIVISION OF PACIFIC AIRMOTIVE CORPORATION, AND A SUBSIDIARY OF PUREX CORPORATION LTD., A CALIFORNIA CORPORATION, PLAINTIFF, v. DIRECTOR, DIVISION OF TAXATION, DEFENDANT.

Tax Court of New Jersey

March 27, 1981.

SYNOPSIS

Proceeding was instituted to review a "Revised Final Determination" of the Director of the Division of Taxation imposing an assessment against the corporate taxpayer pursuant to the Sales and Use Tax Act. The Tax Court, Crabtree, J. T. C., held that: (1) compliance with the provisions of the Administrative Procedure Act concerning notice and hearing of proposed agency actions was not indispensible to the validity of the sales tax assessment in question; (2) failure to comply with the notice and hearing provisions of the Administrative Procedure Act did not operate to deny the taxpayer due process of law; (3) the Director was not estopped from assessing the tax retroactively even though the action was a reversal of an earlier position with respect to taxability of repair services on property destined for out-of-state delivery; (4) the governing statute, prior to its amendment, authorized the imposition of a sales tax upon receipts from repair services performed in New Jersey, notwithstanding out-of-state delivery of property upon which services were performed; (5) imposition of sales tax upon all repair services performed in New Jersey was not violative of equal protection and due process; and (6) absent evidence of actual multiple taxation, tax in question did not violate commerce clause in that it applied to all receipts from repair services performed within

New Jersey regardless of whether purchaser was a resident or nonresident and irrespective of destination of service property.

Motion of plaintiff for summary judgment denied, and motion of defendant for summary judgment granted.

James F. Keegan for plaintiff (*Gerald C. Neary, James F. Keegan* and *Pitney, Hardin & Kipp*, attorneys; *William Kevin Wright* on the brief).

Harry Haushalter for defendant (*John Degnan*, Attorney General of New Jersey, attorney; *Harry Haushalter* on the brief).

CRABTREE, J. T. C.

This is a sales tax case wherein plaintiff seeks review of a "Revised Final Determination" of defendant Director dated December 18, 1974, imposing an assessment of $628,255.31 (exclusive of interest and penalties) against plaintiff pursuant to the New Jersey Sales and Use Tax Act, *N.J.S.A.* 54:32B–1 *et seq.* The period covered by the assessment is August 12, 1971 to June 30, 1973. Both parties have moved for summary judgment pursuant to *R.* 4:46.

The facts essential to disposition of the motions may be briefly stated.

From 1966 through and beyond the taxable periods in issue plaintiff has been engaged in the business of servicing and overhauling aircraft engines at its place of business in Millville, New Jersey. Upon completion of the work, which is performed entirely within this State, plaintiff ships the serviced or overhauled engines to its customers at their out-of-state locations.

The New Jersey Sales and Use Tax Act, *N.J.S.A.* 54:32B–1 *et seq.* (the act), was passed on April 27, 1966, effective with respect to transactions therein specified occurring on or after July 1, 1966. *L.* 1966, *c.* 30, § 31. On or about June 28, 1966 the New Jersey Sales and Use Tax Bureau issued a press release containing 213 questions and answers concerning the act's interpretation. The release, reproduced in Report 162 of Commerce Clearing House *New Jersey Tax Reports* of July 11, 1966, included the following response to a question addressed to treatment of repair charges imposed with respect to property delivered to an out-of-state customer: "Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser outside the State for use outside the State are exempt from the sales tax."

On August 12, 1971 the Division of Tax Appeals promulgated its decision in the case of *Fisher-Stevens, Inc. v. Taxation Division,* Docket S.T. 109, holding that all sales of direct mailing services performed in New Jersey on mail to out-of-state addresses were subject to sales tax. The decision was affirmed by the Superior Court, Appellate Division. *Fisher-Stevens, Inc. v. Taxation Division,* 121 *N.J. Super.* 513, 298 *A.*2d 77 (App.Div. 1972), certif. den. 62 *N.J.* 575 (1973). In the *State Tax News,* a bi-monthly newsletter published by defendant and aimed at practitioners and large taxpayers, it was announced, in consecutive late-1973 issues, that the sales tax applied to repair services performed in New Jersey even though the serviced property was delivered outside of New Jersey for use outside of this State.

The New Jersey Administrative Procedure Act, *N.J.S.A.* 52:14B–1 *et seq.* (the APA), was enacted effective September 1, 1969. None of the rule-making provisions of the APA, including the requirement of notice and hearing before the promulgation of rules or regulations, were followed in connection with

defendant's publication of the aforementioned issues of *State Tax News*.

The issues are:

1. Is compliance with the APA provisions concerning notice and hearing of proposed agency actions indispensable to the validity of a tax assessment under the Sales and Use Tax Act?

2. Did defendant's failure to comply with the notice and hearing provisions of the APA deny plaintiff due process of law?

3. Did the act, as it stood during the taxable periods in issue, authorize the imposition of a sales tax upon repair services performed in New Jersey on property delivered outside New Jersey for use outside this State?

4. Does the imposition of a sales tax upon repair services to property destined for out-of-state delivery violate the Commerce or Equal Protection Clauses of the United States Constitution?[1]

I. The APA Issue

Plaintiff urges the invalidity of the assessment because it is based upon a rule not adopted in accordance with the APA. The "rule" which plaintiff contends was improperly adopted was the statement appearing in consecutive issues of *State Tax News* concerning defendant's interpretation of the act as applied to repair services performed in New Jersey on property destined for out-of-state shipment. The legal infirmity of defendant's action, says plaintiff, was the failure to give public notice and hearing of the *State Tax News* announcement, as required by *N.J.S.A.* 52:14B–4(d).

[1] While plaintiff advanced no contentions, either in its brief or in oral argument, concerning the Commerce Clause or the Equal Protection Clause, both the complaint and the pretrial order entered November 5, 1979 raise those issues and I will therefore deal with them in this opinion.

Plaintiff's argument is essentially a tightly constructed—and superficially compelling—Aristotelean syllogism whereunder plaintiff equates the *State Tax News* announcements with the APA definition of "rule" (*N.J.S.A.* 52:14B–2(e)), posits the inclusion of the Division of Taxation within the definition of "state agency" (*N.J.S.A.* 52:14B–2(a)), alludes to defendant's failure to comply with the notice and hearing requirements (*N.J.S.A.* 52:14B–4)), and then concludes that, as no rule is valid unless adopted in substantial compliance with those requirements (*N.J.S.A.* 52:14B–4(d)), the assessment here complained of is a nullity.

Unfortunately for plaintiff, its elegant syllogism must yield to the powers explicitly granted defendant by the taxing statute and settled judicial authority construing those powers. The defendant is authorized by § 24 of the act:

> 1. To make, adopt and amend rules and regulations appropriate to the carrying out of this act and the purposes thereof;
>
> . . . . . .
>
> and
>
> 6. To assess, determine, revise and readjust the taxes imposed by this act. . . .
> [*N.J.S.A.* 54:32B-24(1), (6)]

[1, 2] Defendant's authority to assess taxes is thus independent of the requirement to adopt rules and regulations, and his assessing authority is in no way contingent upon the promulgation of rules and regulations. This conclusion is supported not only by a sensible construction of the quoted portions of § 24 of the act, but also by an imposing line of judicial authority. *Securities and Exchange Comm'n v. Chenery Corp.*, 332 *U.S.* 194, 67 *S.Ct.* 1575, 91 *L.Ed.* 1995 (1947); *R. H. Macy & Co. v. Taxation Division*, 77 *N.J.Super.* 155, 185 *A.*2d 682 (App.Div. 1962), aff'd o. b. 41 *N.J.* 3, 194 *A.*2d 457 (1963); *In re Heller*, 73 *N.J.* 292, 374 *A.*2d 1191 (1977). In *Chenery* the court upheld

an SEC determination (disapproving a corporate reorganization plan) that was reached on an *ad hoc* basis and not by way of a formal regulation. The court stated that the absence of a general rule did not invalidate the SEC decision:

> To hold that the Commission had no alternative in this proceeding but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. That we refuse to do.
>
> . . . . . .
>
> . . . The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise . . .. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforseeable situations. In performing its important functions in these respects, therefore, an adminstrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity. [332 *U.S.* at 201–202, 67 *S.Ct.* at 1579–1580]

The *Chenery* principle was applied in *Macy*, a case especially apposite here since it involved tax assessments. In that case the court acknowledged the authority of the Director of the Division of Taxation to impose assessments in compliance with a statutory standard, without prior adoption of a rule or regulation,[2] saying:

> In any event, insofar as the argument before us is premised on the position that the Division of Taxation was powerless to exercise its statutory power to determine fair valuations of Macy's inventories as assets, in accordance with sound accounting principles, without *first* adopting a general rule

[2] Although the *Macy* case was decided seven years before the enactment of the APA, the New Jersey Constitution provided, during the tax years at issue (1956, 1957 and 1958) that no rule or regulation of a state agency, department, officer or authority could become effective until it was filed with the Secretary of State, *N.J. Const.*, Art. V. § IV, par. 6, a provision similar to that embodied in *N.J.S.A.* 52:4B-14(d), cited earlier in the text.

that all department stores must report and are to be taxed on the base of Fifo inventories, the contention is without merit. First, without more evidence, we cannot say that such a rule of unvarying application in all such cases would necessarily be appropriate. Second, and more important, there is, as we have decided, an adequate legislative standard in this act for administrative guidance, and in such case the development of subsidiary rules and principles on a case-by-case basis is not proscribed. [77 *N.J.Super.* at 180, 185 *A.*2d 682]

[3] The *Macy* decision is dispositive of the issue raised by plaintiff. The Legislature, by enacting *N.J.S.A.* 54:32B–3(b)(2), has delineated the standards to be applied by defendant in determining whether a particular service is subject to sales tax. In light of this standard, the Director was not required to reflect his policies explicitly in the form of a regulation before imposing the assessment in question. As noted in *Macy*, such a requirement would limit defendant's capacity to assess taxes, notwithstanding the existence of adequate legislative standards.

[4–6] The Legislature did not intend that the APA should impose unreasonable restraints upon the assessment of taxes by requiring that the validity of every assessment should be contingent upon the prior adoption of a regulation. Such an interpretation would require defendant to adopt regulations to meet every conceivable contingency that might arise in the context of future tax assessments, and would also jeopardize tax revenues which the Legislature directed the Division of Taxation to collect. The APA was not meant to supplant defendant's authority to assess and collect taxes, an authority explicitly granted to him by *N.J.S.A.* 54:32B–24(6). Indeed, the APA expressly excludes from its coverage "agency decisions and findings in contested cases," *N.J.S.A.* 52:14B–2(e)(3), a category which undeniably embraces tax assessments.

[7, 8] Plaintiff also contends that the publication of defendant's position in the *State Tax News*, without notice to plaintiff or the public, as allegedly required by the APA, denied

plaintiff due process of law. This contention is not well-founded. While it is true that a taxpayer must be given an opportunity, upon adequate notice, to challenge the validity of an assessment, due process only requires that such opportunity be afforded at some stage before a tax becomes irrevocably fixed as a charge on the taxpayer's property. *Central of Georgia R. R. Co. v. Wright,* 207 *U.S.* 127, 28 *S.Ct.* 47, 52 *L.Ed.* 134 (1907); 72 *Am.Jur.*2d, *State and Local Taxation,* § 782. Plaintiff's rights to due process are vindicated in the very proceeding hence under consideration; it has availed itself of the right to present its position in a lengthy written brief and extended oral argument thereon. Due process does not extend, however, to the alleged right of public participation by others, *Gallup v. Schmidt,* 183 *U.S.* 300, 22 *S.Ct.* 162, 46 *L.Ed.* 207 (1902), nor does it require that plaintiff be allowed to press its views as a *quasi*-legislative proceeding such as a rule-making hearing under the APA. *Williams v. Eggleston,* 170 *U.S.* 304, 18 *S.Ct.* 617, 42 *L.Ed.* 1047 (1898).

While plaintiff disavows reliance upon an estoppel theory, it appears nevertheless to argue for the application of that theory on the basis of the alleged reversal of defendant's position with respect to taxability of repair services on property destined for out-of-state delivery. Plaintiff seems to claim detrimental reliance upon defendant's earlier position, expressed in the June 28, 1966 press release, in that the sales tax was not collected from out-of-state customers prior to the reversal of defendant's position published in the late 1973 issues of *State Tax News.* The disputed assessment, of course, covers taxable periods prior to the *State Tax News* publication of defendant's position, but those periods did not antedate the date of the Division of Tax Appeals decision in the *Fisher-Stevens* case (August 12, 1971).

[9–11] The collection and enforcement of taxes is a strict governmental function and vitally affects the public interest. *State v. Erie Railroad Co.,* 23 *N.J.Misc.* 203, 42 *A.*2d 759

(Sup.Ct. 1945). *See East Orange v. Livingston,* 102 *N.J.Super.* 512, 522, 246 *A.*2d 178 (Law Div.1968), aff'd 54 *N.J.* 96, 253 *A*2d 546 (1969). The taxing authority is not bound or estopped by unauthorized acts of its officers, *Bayonne v. Murphy & Perrett Co.,* 7 *N.J.* 298, 81 *A.*2d 485 (1951), nor may estoppel be invoked in cases of agency acquiescence or reversals or modifications of prior positions. *Illinois Power Co. v. Mahin,* 49 *Ill.App.*3d 713, 7 *Ill.Dec.* 436, 364 *N.E.*2d 597 (App.Ct.1977), aff'd 72 *Ill.*2d 189, 21 *Ill.Dec.* 144, 381 *N.E.*2d 222 (Sup.Ct.1978); *Boswell v. Abex Corp.,* 294 *Ala.* 334, 317 *So.*2d 317 (Sup.Ct.1975). Moreover, a rule or regulation of a state tax commission purporting to exempt a taxpayer or a transaction from tax liability where authority to do so has not been specifically granted by the Legislature cannot operate as an estoppel to collect the tax, even in the case of transactions which have been closed so that the seller cannot collect the tax from the purchaser. *Crane Co. v. Arizona State Tax Comm'n,* 63 *Ariz.* 426, 163 *P.*2d 656 (Sup.Ct. 1945), overruled on other grounds *Duhame v. State Tax Comm'n,* 65 Ariz. 268, 179 *P.*2d 252 (Sup.Ct.1947).

[12, 13] Of some relevance here is the long-prevalent judicial attitude in federal tax cases, where claims of estoppel against the Commissioner of Internal Revenue because of his reversal of legal positions to the alleged detriment of taxpayers, have been viewed with a jaundiced eye. The settled rule, applied uniformly to all types of taxes, is that the Commissioner of Internal Revenue is empowered retroactively to correct mistakes of law in the application of the tax laws to particular transactions, even where the taxpayer relied to his detriment on the Commissioner's mistake. *Automobile Club of Michigan v. Internal Revenue Comm'r,* 353 *U.S.* 180, 77 *S.Ct.* 707, 1 *L.Ed.*2d 746 (1957), reh. den. 353 *U.S.* 989, 77 *S.Ct.* 1279, 1 *L.Ed.*2d 1147 (1957); *Dixon v. United States,* 381 *U.S.* 68, 85 *S.Ct.* 1301, 14 *L.Ed.*2d 223 (1965); *Martin's Auto Trimming, Inc. v. Riddell,*

283 *F.*2d 503 (9 Cir., 1960); *Davar Products, Inc. v. United States,* 245 *F.Supp.* 460 (S.D.N.Y.1965); 10 *Mertens, Law of Federal Income Taxation* (1974 rev.), §§ 60.14, 60.16. The rule precluding estoppel against the Commissioner of Internal Revenue is applied even where the reversed determination was originally addressed specifically to the complaining taxpayer and with respect to a particular transaction or series of transactions. *Automobile Club of Michigan v. Internal Revenue Comm'r, supra; Massaglia v. Internal Revenue Comm'r,* 286 *F.*2d 258 (10 Cir. 1961).

The underlying rationale is cogently stated in *Dixon v. United States, supra:*

> This principle is no more than a reflection of the fact that Congress, not the Commissioner, prescribes the tax laws. The Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law. Consequently it would appear that the Commissioner's acquiescence in an erroneous decision, published as a ruling, cannot in and of itself bar the United States from collecting a tax otherwise lawfully due. [at 85 *S.Ct.* 1304.]

The rule of the federal cases, resting, as it does, upon considerations of sound administration of the revenue laws, is applicable to the instant case.

[14–16] As will be seen from the discussion to follow, defendant's assessment was imposed in compliance with the legislative standard embodied in *N.J.S.A.* 54:32B–3(b)(2) (dealing among other matters, with a sales tax on repair services to tangible personal property). That standard cannot be vitiated by an erroneous construction thereof by the Division of Taxation, not even where the taxpayer proves detrimental reliance upon such construction. Neither defendant nor any official responsible to him is authorized to waive state tax revenues. *Boswell v. Abex Corp., supra.*

II. Merits of the Assessment

[17] Plaintiff contends that the activity which triggers application of the sales tax is delivery of the goods upon which the services have been performed, and that, delivery being outside New Jersey, the act does not apply. Defendant, on the other hand, argues that the tax is imposed upon receipts from repair services performed in New Jersey, and out-of-state delivery of the property upon which the services were performed is not relevant. I conclude that defendant's position is the correct construction of the statute.

N.J.S.A. 54:32B–3 imposes a tax upon:

. . . . . .

(b) The receipts from every sale, except for resale, of the following services:

. . . . . .

(2) Installing tangible personal property, or maintaining, servicing, repairing tangible personal property . . . .

The term "sale" is broadly defined to include "the rendering of any service taxable under this act, for a consideration." *N.J.S.A.* 54:32B–2(f). The term "receipt" is defined to include "the charge for any service taxable under this act." *N.J.S.A.* 54:32B–2(d).

[18, 19] Ascribing to the words of the statute the ordinary meaning associated with them, and considering the transactional nature of the tax, I conclude that the repair services involved in this case are subject to the sales tax by reason of *N.J.S.A.* 54:32B–3(b)(2), regardless of the destination of the repaired property following completion of the services. When the performance of an activity is subjected to a sales tax, the place of performance determines the place of taxation. *Serodino, Inc. v. Woods,* 568 *S.W.*2d 610 (Tenn. Sup.Ct.1978); *Parish of Jefferson v. Ekco-Glaco,* 280 *So.*2d 629 (La.App.1973).

The legislative history of the act reinforces the conclusion that the repair services in issue here are subject to sales tax. The act was drawn from the corresponding New York Sales and Compensating Use Tax Law, *L.* 1965, *c.* 93; *McKinney's Consolidated Laws of New York Annotated,* § 1101 *et seq. New Jersey Bell Tel. Co. v. Taxation Division,* 152 *N.J.Super.* 442, 378 *A.*2d 38 (App.Div.1977), certif. den. 75 *N.J.* 594, 384 *A.*2d 824 (1978). The New York statute provided for imposition of the sales tax upon repair services in language substantially similar to the language of *N.J.S.A.* 54:32B–3(b)(2). The New York law, however, expressly exempted services performed upon tangible property delivered and used outside the state. § 1115(d). The New Jersey statute included no such exemption until the 1977 amendment (to be hereinafter discussed), notwithstanding the adoption in *N.J.S.A.* 54:32B–8 of many of the exemptions contained in the New York law.

[20, 21] Where the Legislature adopts a new law, using as a source a statute theretofore enacted in another jurisdiction, but omits a provision of the source statute, the omission is construed as being deliberate. *Bank of America v. Webster,* 439 *F.*2d 691 (9 Cir. 1971); *Re Walker's Will,* 258 *Wis.* 65, 45 *N.W.*2d 94 (Sup.Ct.1950); *Beckham v. Hartford Accident and Indem. Co.,* 137 *So.*2d 99 (La.App.1962). Indeed, all changes in words and phrasing in a statute adopted from another state are deemed deliberately made with the purpose of limiting, qualifying or enlarging the adopted rule. *Martin v. American Potash and Chemical Corp.,* 33 *Del.Ch.* 234, 92 *A.*2d 295 (1952); *Sutton v. Duke,* 277 *N.C.* 94, 176 *S.E.*2d 161 (Supreme Ct. 1970).

Section 3(b)(2) of the act, *N.J.S.A.* 54:32B–3(b)(2) was amended in 1977, *L.* 1977, *c.* 54, to exempt from sales tax the transactions in controversy here. The Statement of the Assembly

Committee on Taxation appended to the bill (Assembly Bill 1787) read:

> The bill proposes to exempt from the sales tax services performed by New Jersey companies on tangible personal property delivered out of state. Because New Jersey is the only State with the possible exception of New Mexico, that imposes a sales tax on such transactions, it places New Jersey businesses at a considerable disadvantage in maintaining such operations. The imposition of the tax is one which did not occur in the beginning years of the sales tax but was imposed by interpretation later. Such taxes, when assessed against New Jersey business, in many instances incur a loss because they are unable to collect from customers after the fact. [Emphasis Supplied]

Plaintiff points to the underscored sentence as evidence of the Legislature's intent to exempt the transactions in issue upon enactment of the act in 1966. I cannot agree.

[22, 23] To begin with, the amendment itself is indicative of a change in the law. It is a well established rule of statutory construction that a change of language in a statute implies a purposeful alteration in substance of the law. *Nagy v. Ford Motor Co.*, 6 *N.J.* 341, 78 *A.*2d 709 (1951); *Cold Indian Springs Corp. v. Ocean Tp.*, 154 *N.J.Super.* 75, 380 *A.*2d 1178 (Law Div.1977), aff'd 161 *N.J.Super.* 586, 392 *A.*2d 175 (App.Div.1978), rev'd on other grounds 81 *N.J.* 502, 410 *A.*2d 652 (1980); 1A *Sutherland, Statutory Construction* (4 ed. 1972), § 22.30 at 178. Secondly, the underscored sentence in the Assembly Committee on Taxation Statement is of little probative value in ascertaining the legislative intent at the time of the act's passage in 1966. Committee reports which are made after passage of the statute to be construed are of little value, and that value decreases with the elapse of time. 2A *Sutherland, op. cit.*, § 48.06 at 203. *Cf. First State Bank of Hudson Cty. v. United States*, 599 *F.*2d 558 (3 Cir., 1979), *cert.* den. 444 *U.S.* 1013, 100 *S.Ct.* 662, 62 L.Ed.2d 642 (1980) (subsequent Congress cannot speak for intent of earlier Congress in the enactment of a particular statute).

III. Constitutional Issues

A. *Due Process and Equal Protection*

Plaintiff claims a violation of the equal protection and due process provisions of the United States and New Jersey Constitutions, in that the act, as applied here, makes an irrational and arbitrary distinction between out-of-state sales of tangible personal property and services performed in New Jersey on property destined for out-of-state delivery, the former being immune from taxation while the latter is taxable.

[24–26] It is, of course, well settled that a state may not constitutionally impose a sales tax upon the sale of goods delivered to the buyer beyond the taxing state. *McLeod v. Dilworth,* 322 *U.S.* 327, 64 *S.Ct.* 1023, 88 *L.Ed.* 1304 (1944). *Cf. J. D. Adams Mfg. Co. v. Storen,* 304 *U.S.* 307, 58 *S.Ct.* 913, 82 *L.Ed.* 1365 (1938) (gross income tax on out-of-state sales held invalid). It does not necessarily follow, however, that services performed within the taxing state are likewise exempt if the serviced property is delivered beyond the state. The distinction implicitly made by the Legislature is within its constitutional power and does not violate the Equal Protection Clause, since there is a presumptively rational basis for the distinction. *Allied Stores of Ohio, Inc. v. Bowers,* 358 *U.S.* 522, 79 *S.Ct.* 437, 3 *L.Ed.*2d 480 (1959). States are given "large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 *U.S.* 356, 359, 93 *S.Ct.* 1001, 1003, 35 *L.Ed.*2d 351 (1973). A strong presumption of constitutionality attends the legislative classification, *id.* at 364, 93 *S.Ct.* at 1006, and the party challenging it must negate "every conceivable" basis for the statute, since the statute must be upheld if any state of facts can be reasonably conceived to sustain it. *Allied Stores of Ohio, Inc. v. Bowers, supra* 358 U.S. at 528, 79 *S.Ct.* at 441; *Robbiani v. Burke,* 77 *N.J.* 383, 391-392, 390 *A.*2d 1149

(1978); *Taxpayers Ass'n of Weymouth Tp., Inc. v. Weymouth Tp.*, 80 *N.J.* 6, 39-40, 364 *A.*2d 1016 (1976).

[27] In the present case there is no basis for plaintiff's allegation of an irrational, arbitrary classification by the legislature. The imposition of the sales tax upon all repair services performed in New Jersey is eminently rational as the State's connection with the rendition of the service is exactly the same whether or not the property is delivered beyond the State.

So much for plaintiff's equal protection contention. Plaintiff's due process allegation may be dispatched even more summarily.

[28–30] The due process requirement is satisfied if there is some nexus, however minimal, between the activity to be taxed and the taxing state. *Wisconsin v. J. C. Penney,* 311 *U.S.* 435, 61 *S.Ct.* 246, 85 *L.Ed.* 267 (1940); *Miller Bros. Co. v. Maryland,* 347 *U.S.* 340, 74 *S.Ct.* 535, 98 *L.Ed.* 744 (1954). The protection afforded by the state requires that the activity bear a just share of the cost of state government. *Western Live Stock v. Revenue Bureau,* 303 *U.S.* 250, 58 *S.Ct.* 546, 82 *L.Ed.* 823 (1938). The aircraft engines were serviced and overhauled by plaintiff entirely within New Jersey and those engines, as well as the property in which they were stored, enjoyed the protection and services provided by state and local government so long as they remained here.

Plaintiff's equal protection and due proccess challenges are without merit.

B. *The Commerce Clause*

Plaintiff alleges a violation of the Commerce Clause of the United States Constitution, Article I, § 8, in that the act, as applied here, unlawfully subjects interstate transactions to an unapportioned direct tax.

[31–33] State taxation of interstate transactions does not violate the Commerce Clause if it operates to exact "from interstate commerce its fair share of the cost of state government." *Washington Dept. of Revenue v. Association of Washington Stevedoring Co's.*, 435 *U.S.* 734, 748, 98 *S.Ct.* 1388, 1398, 55 *L.Ed.*2d 682 (1978). The mere fact that, as in the present case, the transactions are the products of contracts between residents of different states, does not immunize the transactions from state or local taxation. *Western Live Stock v. Revenue Bureau, supra.* The fact that property which is the subject of the transaction is immediately transported out of the taxing state does not change the result. *State Tax Comm'n v. Pacific Cast Iron Pipe Co.*, 372 *U.S.* 605, 83 *S.Ct.* 925, 10 *L.Ed.*2d 8 (1963).

[34, 35] In *Complete Auto Transit, Inc. v. Brady*, 430 *U.S.* 274, 97 *S.Ct.* 1076, 51 *L.Ed.*2d 326 (1977), the Supreme Court ruled that a state tax is not an unconstitutional burden upon interstate commerce if (1) there is a sufficient nexus with the state to justify the tax, (2) the tax is fairly related to the benefits provided by the state to the taxpayer, (3) the tax does not discriminate against interstate commerce and (4) the tax is fairly apportioned to local activities. The act, as applied to the transactions here in issue, meets three of these four tests.

[36] The first two tests are covered in the foregoing discussion of plaintiff's equal protection and due process claims. The third test (nondiscriminatory treatment of interstate transactions) is satisfied if the tax places the same burden upon interstate commerce. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 *U.S.* 33, 60 *S.Ct.* 388, 84 *L.Ed.* 565 (1940). In this case the act applied to *all* receipts from repair services performed within New Jersey, regardless of whether the purchaser is a resident or non-resident and irrespective of the destination of the serviced property.

[37, 38] The fourth test (fair apportionment to local activities) is intended to avoid multiple taxation of the same transaction by two or more states. The vice to be avoided in the case of transactional taxes (such as sales or gross receipts taxes) is the potential that each state touched by the transaction has an equal right to impose a tax, so that, without protection of the Commerce Clause, the commerce would bear cumulative burdens not imposed upon local commerce. *General Motors Corp. v. Washington,* 377 *U.S.* 436, 84 *S.Ct.* 1564, 12 *L.Ed.*2d 430 (1964); *Western Live Stock v. Revenue Bureau, supra; J. D. Adams Mfg. Co. v. Storen, supra.* The taxpayer, however, has the burden of proving *actual* multiple taxation. *Standard Pressed Steel v. Revenue Dep't,* 419 *U.S.* 560, 95 *S.Ct.* 706, 42 *L.Ed.*2d 719 (1975); *General Motors Corp. v. Washington, supra.* A finding of duplicative taxes may not rest on speculative grounds. *Moorman Mfg. Company v. Bair,* 437 *U.S.* 267, 98 *S.Ct.* 2340, 57 *L.Ed.*2d 197 (1978). The fair apportionment test is satisfied if it appears that no other state could justifiably tax the transaction in question. *Fisher-Stevens, Inc. v. Taxation Division,* 121 *N.J. Super.* 513, 298 *A.*2d 77 (App.Div.1972), certif. den. 62 *N.J.* 575, 303 *A.*2d 328 (1973); *Corning Laboratories, Inc. v. Iowa State Revenue Dep't,* 270 *N.W.*2d 463 (Iowa Sup.Ct.1978). Moreover, the imposition of a use tax by another state upon the same transaction does not result in multiple taxation in derogation of the fair apportionment test. *International Harvester v. Treasury Dep't,* 322 *U.S.* 340, 64 *S.Ct.* 1019, 88 *L.Ed.* 1313 (1944); *Treasury Dep't v. Wood Preserving Corp.,* 313 *U.S.* 62, 61 *S.Ct.* 885, 85 *L.Ed.* 1188 (1941).

Conceivably, the states of destination of the overhauled or serviced aircraft engines impose sales, as distinguished from use taxes, on the purchasers of plaintiff's services on the basis that delivery, not performance of services, is the taxable event. Alternatively, those states—or some of them—might impose a sales tax on the repair parts used by plaintiff in its work on the

aircraft engines. (The affidavit of plaintiff's vice-president and general manager indicates that, typically, up to 80% of plaintiff's charges are attributable to the cost of parts used in overhauls.) *See State v. Communication Equip. & Contr. Co., Inc.*, 335 *So.*2d 123 (Ala.App.1976). Thus, there remains the possibility of actual duplicative taxation.

IV. Conclusion

The Administrative Procedure Act is inapplicable to the actions taken by defendant with respect to its publications in *State Tax News* and the disputed assessments of sales tax. Defendant's power to make assessments pursuant to the Sales and Use Tax Act is not contingent upon prior adoption of a rule attended by notice and public hearing.

Moreover, defendant's failure to comply with the notice and hearing requirements of the APA with respect to rule-making did not deprive plaintiff of due process, nor did its alleged detrimental reliance upon defendant's earlier position that the disputed transactions were nontaxable estop defendant from assessing and collecting the tax.

Both a sensible construction of the act and the legislative history thereof compel the conclusion that repair services performed within the State upon tangible personal property are subject to sales tax, regardless of the destination of the repaired property following completion of the services.

The aforementioned interpretation of the act violates neither the Due Process Clause nor the Equal Protection Clause of the New Jersey and United States Constitutions.

The act may be violative of the Commerce Clause of the United States Constitution upon a showing of actual duplicative taxation. As this issue was not covered by the summary judg-

ment motions, there remains an issue of material fact to be resolved at a trial. *R.* 4:46-2. The parties will be given an opportunity to submit proofs on this issue alone. Those proofs will be directed to the identification of the states to which the serviced aircraft engines were delivered, the nature and quantum of the taxes imposed by statutes of those states upon the transactions in issue here whether any such taxes were actually assessed, the extent of actual collection of such taxes, the applicable statutes of limitation upon assessment and collection of any such allegedly duplicative taxes (where those taxes are claimed to be due but remain unassessed or uncollected), and such other evidence as the parties deem germane to the issue of duplicative or multiple taxation. As stated earlier in this opinion, however, plaintiff bears the burden of proof with respect to such issue.

Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted with respect to all issues except the duplicative taxation aspect of the Commerce Clause issue, with respect to which defendant's motion is denied.

AIRWORK SERVICE DIVISION, A DIVISION OF PACIFIC AIRMOTIVE CORPORATION, A CALIFORNIA CORPORATION, AND A SUBDIVISION OF PUREX CORPORATION LTD., A CALIFORNIA CORPORATION, PLAINTIFF-APPELLANT, v. DIRECTOR, DIVISION OF TAXATION, DEFENDANT-RESPONDENT.

Superior Court of New Jersey
Appellate Division

Argued March 15, 1982—Decided April 28, 1982.

SYNOPSIS

Taxpayer appealed from an order and judgment of the Tax Court, 2 N.J.Tax 329, raising the issue of whether an assessment should extend only to the cost of labor, not to cost of parts. The Superior Court, Appellate Division, held that the taxpayer was precluded from raising the issue on appeal where the issue was neither raised in the petition of appeal through the former Division of Tax Appeals, nor incorporated as an issue in the pretrial order of the Tax Court, nor raised or argued in the cross motion for summary judgment, nor considered by the Tax Court in its opinion.

Affirmed.

Before Judges MILMED, JOELSON and GAULKIN.

Gerald C. Neary argued the cause for appellant *(Pitney, Hardin, Kipp & Szuch,* attorneys).

Harry Haushalter, Deputy Attorney General, argued the cause for respondent (*Irwin I. Kimmelman,* Attorney General of New Jersey, attorney; *James R. Zazzali,* former Attorney General of New Jersey, *Erminie L. Conley,* former Assistant Attorney General, and *Harry Haushalter,* on the brief.)

PER CURIAM.

The order and judgment under review are affirmed substantially for the reasons expressed by Judge Crabtree in his written opinion for the Tax Court of March 27, 1981, 2 *N.J. Tax* 329 and in light of the determination of plaintiff-appellant to forego the opportunity to submit proofs on the issue of "duplicative taxation" referred to therein.

Additionally, we need give no consideration here to plaintiff's contention, raised for the first time on this appeal, that "[e]ven if valid, the assessment should extend only to the cost of labor, not to the cost of parts." The Attorney General, in his brief on behalf of defendant-respondent Director of the Division of Taxation, notes that

> . . . This issue was neither raised in the petition of appeal [to the former Division of Tax Appeals] nor incorporated as an issue in the pretrial order [of the Tax Court], nor raised or argued in the cross-motions for summary judgment, nor considered by the trial court in its opinion. The defendant has never been accorded an opportunity to address this issue at the trial court level and, therefore, has never had the opportunity to rebut the plaintiff's allegation that a significant portion of the receipts are non-taxable because they related to the sale of parts.
>
> This issue, which is clearly raised as an afterthought at this late date, requires a thorough factual analysis as to the nature of the parts involved, the extent to which such parts were previously repaired or restored by Airwork in New Jersey, the manner in which Airwork acquired such parts, the condition such parts were in at the time of acquisition and the relative value of Airwork's skill in using such parts to repair complex machinery. . . .

The Attorney General properly concludes that:

> . . . Airwork was clearly required to timely-raise below the issue as to the sale of parts and, thereby, allow for the compilation of a full factual record on this question. Having failed to raise this issue below, Airwork is now precluded from raising this issue on appeal.

See *State v. Souss*, 65 *N.J.* 453, 460, 323 *A.*2d 484 (1974); *Nieder v. Royal Indemnity Insurance Co.*, 62 *N.J.* 229, 234, 300 *A.*2d 142 (1973).

Affirmed.

METROMEDIA, INC., PLAINTIFF-APPELLANT, v. DIRECTOR, DIVISION OF TAXATION, DEFENDANT-RESPONDENT.

Argued November 7, 1983—Decided July 23, 1984

SYNOPSIS

Out-of-state corporation owning five television and radio stations located out of state challenged Director of Division of Taxation's authority to assess corporate business tax against it based on corporation's share of local audience. The Tax Court, 3 N.J.Tax 397, struck down allocation factor as invalid rule making, and Director appealed. The Superior Court, Appellate Division, Furman, J.A.D., 187 N.J.Super. 562, reversed, and corporation petitioned for certification. The Supreme Court, Handler, J., held that: (1) Director's adoption of audience share method to assess tax on corporation was a fair and proper method for effecting reasonable attribution of revenues to state, and thus, was within authority of Director, but (2) Director's determination constituted a rule, the adoption of which required compliance with statutory rule-making procedures, since determination was clearly one of general applicability to regulated class; therefore, action taken by Director in assessing corporation was invalid absent prior promulgation of rules in compliance with Administrative Procedure Act.

Appellate Division's judgment reversed and Tax Court judgment affirmed.

Wilentz, C.J., and Pollock and O'Hern, JJ., filed dissenting opinion.

Joseph P. LaSala argued the cause for appellant (*Robinson, Wayne, Levin, Riccio & LaSala*, attorneys; *Kenneth Greene*, of counsel; *Mr. LaSala* and *Lawrence P. Platkin*, on the briefs).

Harry Haushalter, Deputy Attorney General, argued the cause for respondent (*Irwin I. Kimmelman*, Attorney General of New Jersey, attorney; *James J. Ciancia*, Assistant Attorney General, of counsel).

The opinion of the Court was delivered by

HANDLER, J.

This case involves the validity of a tax deficiency assessment made by the defendant, Director, Division of Taxation (Director), against plaintiff, Metromedia, Inc., under the New Jersey Corporation Business Tax Act, *N.J.S.A.* 54:10A-1 to -40 (Act). Metromedia, Inc. (Metromedia or taxpayer) is a Delaware corporation engaged in the ownership and operation of television and radio stations. In determining the net business receipts of the taxpayer attributable to its operation in the state pursuant to the Act, the Director used a calculation referred to as an "audience share." This calculation is designed to measure receipts attributable to New Jersey by relating the taxpayer's revenues to its listening and viewing audiences in the state. However, this method for determining the New Jersey receipts of a multi-state television or radio enterprise had not been used by the Director before its application to Metromedia in this case. The major issue, therefore, is whether the decision to use this factor in effect constitutes administrative rule-making, within the meaning of the Administrative Procedure Act, *N.J.S.A.* 52:14B–1 to –15 (APA), necessitating compliance with the statutory requirements of the APA governing the adoption of agency rules. We must also examine the issue of whether the Act itself, in the absence of an implementing regulation, authorizes

the allocation of receipts by the use of the "audience-share" factor.

I

Metromedia has filed corporate business tax returns since 1957, but disputes the deficiencies assessed against it only for the years 1972–1975. During those years, Metromedia owned and operated several television and radio stations, including stations WNEW–TV, WNEW–AM, and WNEW–FM, located in New York City[1] and serving the New York metropolitan area, and WIP–AM and WMMR–FM, located in Philadelphia[2] and serving the Philadelphia metropolitan area. Metromedia earns revenue from the sale of network air-time to national and local advertisers represented by advertising agencies. Most of these agencies are located in New York City, and, for present purposes, none is situated in New Jersey. Rates charged for advertising are based primarily on the size of the listening or viewing audience in the area served by the station.

No activity in connection with advertising sales or receipts occurred in New Jersey. Consequently, for the years in question the taxpayer reported no advertising revenues from these stations as attributable to the state. The Director, however, during its 1978 audit, allocated some of Metromedia's business receipts to New Jersey by applying a factor called "audience share."

[1] All three stations' offices are located in New York City. All sales contracts were approved in New York and all commercials were aired from the New York locations of the stations. Only WNEW-AM maintained property in New Jersey. Its transmitter facility in Carlstadt consisted of a concrete blockhouse and four broadcast towers and was maintained and serviced by three full-time shift employees.

[2] Both stations' offices are located in Philadelphia, where the commercials are aired. All sales contracts are approved in New York. During the relevant time period, only WIP-AM maintained property in New Jersey. Its transmitter facility, located in Bellmawr, consisted of a concrete blockhouse and two broadcast towers, and Philadelphia-based employees performed part-time maintenance work at the site.

This calculation purported to reflect New Jersey earnings that the Director claimed were generated by virtue of the stations' signals reaching audiences in the state. For each station reaching New Jersey, the Director multiplied Metromedia's total receipts by a fraction or percentage that consisted of a ratio of the station's New Jersey audience to its total audience. The sum of these results for each of the five stations reaching New Jersey audiences was then incorporated into the statutory formula used to determine the taxpayer's New Jersey franchise tax base, consisting of both net worth and net income.

The taxpayer sought review of this determination in the Tax Court, challenging the Director's authority to set and apply the allocation factor. The Tax Court ruled that the "audience share" concept in effect constituted a "rule," within the meaning of the APA, and therefore its adoption by application in this case was invalid because it failed to comply with the requirements applicable to the promulgation of agency rules. 3 *N.J.Tax* 397 (1981). Because of its disposition on this ground, the Tax Court did not address contentions that the Act was unconstitutionally vague and therefore violative of the Due Process Clause. 3 *N.J.Tax* at 405–06. The court concluded, however, that the statute "[does not] support the use of an audience factor in the absence of an administrative rule, properly adopted* * *." *Id.* at 412–13.

The Director appealed and the Appellate Division reversed, finding that the Director's actions were authorized by the Act. 187 *N.J.Super.* 562, 564 (1983). We granted Metromedia's petition for certification to consider whether the Director's action was invalid for failure to comply with the APA, and whether the Director's use of an audience factor exceeded his discretionary authority under the Act. 97 *N.J.* 290 (1983).

II

The New Jersey Corporation Business Tax Act imposes a franchise tax on all nonexempt foreign and domestic corporations that exercise a corporate franchise, do business, employ or own capital or property, or maintain an office in New Jersey. *N.J.S.A.* 54:10A–2. The tax is computed by reference to the taxpayer's net worth tax base and net income base. *N.J.S.A.* 54:10A–5; *see Fedders Corp. v. Director, Div. of Taxation*, 96 *N.J.* 376 (1984). The receipts or revenues of the taxpayer that are considered in the net income tax base for tax purposes are those that arise from (1) sales of tangible personal property from within this state, (2) services performed within the state, (3) rentals from property and royalties from the use of patents or copyrights within the state, and (4) all other business receipts that are earned within the state. *N.J.S.A.* 54:10A–6(B)(6).

For corporations that maintain a regular place of business outside of New Jersey, the Act recognizes that only a percentage of the taxpayer's net worth and net income may be the result of its activities in the state. Consequently, an "allocation" formula is applied to both the net worth and net income tax bases so that only those portions of net worth and net income, respectively, that are fairly attributable to the corporation's activities in New Jersey are used in the measure of the tax. *N.J.S.A.* 54:10A–6. The allocation formula consists of three factors, namely, property, payroll and receipts. Each of the three factors in the so-called three-ply formula is expressed as a fraction, the numerator of which is, respectively, the taxpayer's New Jersey property, receipts, and payroll, and the denominator of which is the taxpayer's total property, receipts, and payroll generated by the operations of the entire enterprise. *N.J.S.A.* 54:10A–6(B). These fractions are averaged, and the combined fraction is then applied to the taxpayer's total net worth and net income in order to determine the percentage or portion of net worth and income properly attributable, and thus taxable, to New Jersey. *Id.*

[1] It is the implicit premise of the Act that the statutory three-ply formula can only approximate the taxpayer's true net worth and income generated by its New Jersey activities. Hence, the Act gives the Director broad authority to adjust the allocation factor in order to reflect more accurately and fairly the activity, business, receipts, capital, entire net worth, or entire net income of a taxpayer reasonably referable to the state. *N.J.S.A.* 54:10A–8 authorizes the Director to make the following particular adjustments: (1) to adhere to those factors already set forth in the statutory formula, namely, property, receipts, and payrolls; (2) to include in the formula one or more other acceptable recognized factors, such as expenses, purchases, or existing contracts; and (3) to exclude one or more assets from the formula or from the entire net worth tax base. In addition to this specific authority, the Director is given broad general discretion to "apply* * * any other similar or different method calculated to effect a fair and proper allocation of the entire net income and the entire net worth reasonably attributable to the State." *Id.*

As noted, the Director used the "audience share" as a modification of the "receipts factor" of the three-ply formula in order to adjust the percentage of the taxpayer's total receipts allocable to New Jersey. Metromedia contends that the Director's determination was not authorized by any provisions of the Act and exceeded the Director's statutory discretion.[3] The argument is that the use of the "audience factor" is *ultra vires*. We disagree.

[2, 3] Clearly, the language of the statute vests broad authority in the Director to determine what income-producing activity of the taxpayer is reasonably referable to its business in

[3] In this case, the new allocation factor, consisting of the audience factor, was a result solely of an adjustment to the numerator of the receipts fraction. No adjustment was made to the denominator of the receipts fraction or to the numerators or denominators of the payroll and property fractions. See discussion, *supra* at 323.

New Jersey, so that this income can appropriately be used in the measure of the franchise tax. The statutory scheme recognizes that this is a highly specialized decision that entails considerable discretion. *See Fedders, supra,* 96 *N.J.* 376. The Director's discretion is bound by standards of "sound accounting principles." *N.J.S.A.* 54:10A–8(e); *R.H. Macy & Co., Inc. v. Director, Div. of Taxation,* 77 *N.J.Super.* 155 (App.Div.1962), aff'd o.b., 41 *N.J.* 3 (1963). It is nonetheless as broad as necessary to enable the Director to determine the fair value of the taxpayer's net worth, *Hawthorne Fabrics v. Kingsley,* 41 *N.J.* 521 (1964), as well as the percentage of net worth and net income that can be attributed to New Jersey, *F.W. Woolworth v. Director, Div. of Taxation,* 45 *N.J.* 466 (1965); *see Household Fin. Corp. v. Director, Div. of Taxation,* 36 *N.J.* 353 (1962).

The broad question of statutory interpretation can be narrowed to whether the use of an audience-share factor to determine the taxpayer's "receipts earned within the State" would constitute any "other similar or different method" of allocation that is made available to the Director under *N.J.S.A.* 54:10A–8(e) to fashion an accurate allocation factor. A "similar method" would presumably be one comparable to the allocation methods specified under the allocation formula in *N.J.S.A.* 54:10A–8(e), namely, receipts, property, and payroll. By example, the Director is specifically empowered to include in the formula, as an "acceptable recognized factor," the value of existing contracts, if in a given case this were relevant in the operation of a particular enterprise. *N.J.S.A.* 54:10A–8(b).

Here, the relevance of the listening and viewing audience of a broadcast enterprise as an allocation factor may be premised on its obvious relationship to the enterprise's "customers". Its utility as an allocation factor applicable to the income of the entity inheres in its perceived correlation to advertising revenues. Consequently, if it is reasonable to presume a relationship between the size of the taxpayer's audiences and its advertising

revenues, then a factor measuring or attributing revenues in terms of audience size would not facially be unsound or arbitrary.[4] These considerations influenced the Tax Court, which said:

> Each of plaintiff's New York and Philadelphia radio and television stations transmitted a signal that reached a specified geographical area known as a "primary coverage area." All five of the stations had a primary coverage area that included areas within New Jersey. For the tax years in question approximately 30% of the total listening and viewing audience in primary coverage areas for WNEW–TV, WNEW–AM and WNEW–FM, and approximately 21% of the total listening audience in the primary coverage areas for WIP–AM and WMMR–FM, was located in New Jersey. Although there was no specific proof in this regard, it can logically be assumed that the stations' advertisers most likely considered the entire geographical makeup of the stations' audiences in their decision to purchase advertising time. [3 *N.J. Tax* at 401.]

Even if it is debatable that an "audience share" is a "similar method" or an "acceptable recognized factor," *N.J.S.A.* 54:10A–8(e) authorizes the Director to adopt a "different method" if it serves to effect "a fair and proper allocation" of the taxpayer's tax base "reasonably attributable to the State." Hence, if the resultant allocation can be considered "fair and proper," and the revenues so calculated can be regarded as "rea-

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[1] As presented by the Tax Court, 3 *N.J.Tax* at 403, the taxpayer's calculation of the allocation fraction, in accordance with the statutory formula, was:

	1972	1973	1974	1975
Property fraction	3.5083%	3.0654%	2.740 %	2.6544%
Payroll fraction	.1389	.1251	.171	.0903
Receipts fraction	–0–	–0–	–0–	–0–
Allocation factor (average of the three fractions)	1.2157%	1.0635%	.9703%	.9149%

The Director's calculation of the allocation fraction, 3 *N.J.Tax* at 404, modifying the receipts factor by the "audience share," was:

	1972	1973	1974	1975
Property fraction	3.5083%	3.0654%	2.740 %	2.6544%
Payroll fraction	.1389	.1251	.171	.0903
Receipts fraction	6.8343	6.6831	6.4722	6.5996
Allocation factor	3.4938%	3.2912%	3.1277%	3.1148%

sonably attributable to the State," the discretionary use of the "audience factor" would be authorized.[5]

There is some extrinsic evidence that an audience factor, applied to taxpayers engaged in the television and radio industry, can be regarded as a fair and proper method for effecting a reasonable attribution of revenues to the state. This method of measuring or attributing "receipts" was suggested in the *Report of the New Jersey Tax Policy Committee, Part V* (Tax Policy Report), submitted to Governor Cahill on February 23, 1972. The Committee observed that the Act empowered the State to tax foreign corporations and recognized that the tax scheme authorized the taxation of corporations whose activities might not squarely fit into the conventional application or understanding of the three-factor allocation formula.

> [T]here is a need for an overall review of the applicability and impact of the general apportionment formula to a number of specialized businesses, with a view toward the adoption of apportionment methods that would be more appropriate to these businesses.* * * [Tax Policy Report at 31.]

Significantly, the Committee further stated:

> [T]he receipts factor, geared to sales of tangible property, is not adapted to television and radio stations, with a consequence that probably little or no receipts allocation would be made to this State. In lieu of the receipts allocation contained in the general formula, a more realistic and more economically justifiably [*sic*] technique might be the allocation of receipts by reference to the listening audience. It is our understanding that this is the way television and radio time charges are determined, so

[5] According to the Tax Court, the difference in the computation of the taxpayer's tax base by using the audience share was illustrated by the 1972 tax year. In 1972 WNEW-TV had overall receipts of $22,682,000, and 29.1% of its audience was ascribed to New Jersey. The Director attributed $6,600,462 to New Jersey receipts. Adding this amount to the products of similar calculations for the other four stations, the Director determined that Metromedia's 1972 New Jersey receipts totalled $10,039,489 and concluded that Metromedia's receipt fraction under *N.J.S.A.* 54:10A-6(B) was 6.8343% ($10,030,489/$146,896,667 (Metromedia's absolute total 1972 receipts)). 3 *N.J.Tax* at 404.

that receipts allocation by reference to the advertising market would respond to the economic realities of the business. [*Id.* at 31, 32].

[4, 5] The use of the audience-share factor seems reasonable. As the Tax Policy Report noted, such an interpretation better accommodates to the economic realities of the broadcast business, in terms of attribution of revenues.[6] We have recognized that the Director's expertise, particularly when exercised in the specialized and complex area covered by these provisions of the Act, is entitled to great respect by the courts. *See, e.g., F.W. Woolworth v. Director, Div. of Taxation, supra,* 45 *N.J.* 466; *Household Fin. Corp. v. Director, Div. of Taxation, supra,* 36 *N.J.* 353; *R.H. Macy & Co., Inc. v. Director, Div. of Taxation, supra,* 41 *N.J.* 3. Moreover, the agency's interpretation of the operative law is entitled to prevail, so long as it is not plainly unreasonable. *New Jersey Guild of Hearing Aid Dispenser's v. Long,* 75 *N.J.* 544 (1978); *Atlantic Transp. Co. v. Director, Div. of Taxation,* 12 *N.J.* 130 (1953). Accordingly, we conclude that in the case of a multi-state television and radio station enterprise whose broadcast operations cover audiences in New Jersey, the Act permits the discretionary choice by the Director to compute the corporate taxpayer's receipts attributable to New Jersey by the application of a factor based upon an "audience share" in this state.

III

The critical issue in this case is whether the agency determination to apply the audience share factor in allocating taxpayer's

[6] Apparently, New York State, prompted by concerns similar to those expressed in the Tax Policy Report, authorized the use of an "audience-share" factor. *Conde Nast Publications, Inc. v. State Tax Comm'n,* 51 *A.D.*2d 17, 378, *N.Y.S.*2d 132 (1976) appeal dismissed, 39 *N.Y.*2d 889, 386 *N.Y.S.*2d 393, 352 *N.E.*2d 580 (1976); *Capital Cities Communications, Inc. v. State Tax Comm'n,* 65 *A.D.*2d 25, 411 *N.Y.S.*2d 46 (1978). See discussion *infra,* at 335.

receipts to New Jersey encompassed *de facto* rule-making and, if so, whether that determination, in order to be valid, had to comply with the requirements governing the promulgation of administrative rules as provided by the APA. Basing its argument upon the statutory definition of "rule" under the APA, *N.J.S.A.* 52:14B-2(e), Metromedia claims that the "audience share factor" that was applied by the Director is tantamount to an agency law or regulation—it constitutes a formal expression or statement of administrative policy effectuating the agency's statutory authority, and, consequently, it must be considered an administrative rule.

Resolution of this issue involves a consideration of the nature of a "rule" as it affects administrative agency policy-making and regulation. *See generally* Mayton, "The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking," 1980 *Duke L.J.* 103 (1980). *N.J.S.A.* 52:14B–2(e) provides:

> (3) "Administrative rule" or "rule," when not otherwise modified, means each agency statement of general applicability and continuing effect that implements or interprets law or policy* * *.

[6] There are several important elements of agency action that in combination serve to define it as either an administrative rule or an administrative adjudication. A critical aspect of this definition is the "general applicability and continuing effect" of the pronouncement. *Id.; see, e.g., Crema v. New Jersey Dept. of Envtl. Protection,* 94 *N.J.* 286 (1983); *Bally Mfg. Corp. v. New Jersey Casino Control Comm'n,* 85 *N.J.* 325, 337 (1981) (Handler, J., concurring); *Boller Beverages, Inc. v. Davis,* 38 *N.J.* 138 (1962); *Glaser v. Downes,* 126 *N.J. Super.* 10 (App.Div. 1973), certif. den. 64 *N.J.* 513 (1974); *see also Securities & Exchange Comm'n v. Chenery Corp.,* 332 *U.S.* 194, 67 *S.Ct.* 1575, 91 *L.Ed.* 1995 (1947); *N.L.R.B. v. Wyman-Gordon Co.,* 394 *U.S.* 759, 777, 89 *S.Ct.* 1426, 1435, 22 *L.Ed.*2d 709, 721 (1969)

(Douglas, J., dissenting). It has been consistently recognized that the widespread, continuing, and prospective effect of an agency pronouncement is the hallmark of an "administrative rule." *See* Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy," 78 *Harv.L.Rev.* 921, 929–42 (1965); Robinson, "The Making Of Administrative Policy: Another Look At Rulemaking and Adjudication and Administrative Procedure Reform," 118 *U.Pa.L.Rev.* 485, 513–28 (1970).

[7] An agency determination that is intended to be applied as a general standard and with widespread coverage and continuing effect can also be considered an administrative rule if it is not otherwise expressly authorized by or obviously inferable from the specific language of the enabling statute. *See Crema, supra,* 94 *N.J.* at 301; *cf. Airwork v. Director, Div. of Taxation,* 97 *N.J.* 290 (1984) (where tax statute is sufficiently specific, determination in the form of a tax assessment does not require antecedent rule); *R.H. Macy & Co., Inc., supra,* 41 *N.J.* 3 (when adequate legislative standard exists for administrative guidance, general rule is not required). For example, in *Boller Beverages, Inc., supra,* 38 *N.J.* 138, this Court held that a determination by the Director of the Division of Alcoholic Beverage Control regarding the packaging and labelling of corn whiskey was neither authorized by sufficiently specific statutory language nor by any implementing regulation. The Court stressed the intended, general applicability of the Director's determination and observed that "[w]here an administrative agent is given full rule-making power, he must, in all fairness, bottom an alleged violation on general legislation before he may rule in a particular case. The general mandate, either statutory or administrative, must precede the specific violation." *Id.* at 155.

[8] Further, when the agency action is concerned with "broad policy issues" that affect a large segment of the regulated or general public, rule-making as such is implicated. *Crema, supra,* 94 *N.J.* at 301–02. The APA itself recognizes that an agency action or determination "that implements or interprets law or policy" can constitute an "administrative rule." *N.J.S.A.* 52:14B–2(e). It is particularly appropriate that parties affected by the proposed agency action have the opportunity to participate in the process leading to the agency determination. *Bergen County Pines Hosp. v. Dept. of Human Services,* 96 *N.J.* 456 (1984); *see also Historic Green Springs, Inc. v. Bergland,* 497 *F.Supp.* 839, 854 (E.D.Va.1980) ("[W]ithout published rules of procedure and substantive criteria for [the taking of the proposed action, affected parties] have been denied any meaningful opportunity for informal response to the proposed action").

[9, 10] Similarly, an agency determination can be regarded as a "rule" when it effects a material change in existing law. *See Crema, supra,* 94 *N.J.* at 302; K.C. Davis, *Administrative Law Treatise* § 7:25 at 186 (2d ed. Supp. 1982); *Ford Motor Co. v. Fed. Trade Comm'n,* 673 *F.*2d 1008, 1009 (9th Cir.1981), *cert.* den., 459 *U.S.* 999, 103 *S.Ct.* 358, 74 *L.Ed.*2d 394 (1982) (an agency determination that changes existing law and has widespread application must be addressed by rule-making and not adjudication). This feature relates not only to fairness to the individual party actually before the agency but to other persons as well. When an agency's determination alters the *status quo,* persons who are intended to be reached by the finding, and those who will be affected by its future application, should have the opportunity to be heard and to participate in the formulation of the ultimate determination. *See Bergen County Pines Hosp., supra,* 96 *N.J.* at 469; *Crema, supra,* 94 *N.J.* at 303; *Boller Beverages, Inc., supra,* 38 *N.J.* at 151.

[11, 12] We have also recognized that the factfinding process that characterizes rule-making is much more flexible and expansive than that governing quasi-judicial adjudication. Where the subject matter of the inquiry reaches concerns that transcend those of the individual litigants and implicate matters of general administrative policy, rule-making procedures should be invoked. *See Dougherty v. Dept. of Human Servs.*, 91 *N.J.* 1 (1982); *Texter v. Dept. of Human Servs.*, 88 *N.J.* 376 (1982). The procedural requirements for the passage of rules are related to the underlying need for general fairness and decisional soundness that sould surround the ultimate agency determination. *See Crema, supra*, 94 *N.J.* 286. These procedures call for public notice of the anticipated action, broad participation of interested persons, presentation of the views of the public, the receipt of general relevant information, the admission of evidence without regard to conventional rules of evidential admissibility, and the opportunity for continuing comment on the proposed agency action before a final determination. *See N.J.S.A.* 52:14B–4.

[13, 14] We can synthesize from this authority that an agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) con-

stitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication.

[15] We acknowledge that in many cases the question of whether the agency determination is a rule or an adjudication is a close one. Frequently, the agency determination is a hybrid, partaking of both the rule-making and adjudicatory mode. *See Bally Mfg. Corp., supra,* 85 *N.J.* at 341–43 (Handler, J., concurring) (recognizing procedures for "specific rule-making"; rule making may be appropriate even when proposed rule has special impact upon particular parties as well as the public). The inquiry can be further clouded because we have noted that an agency can promulgate a rule that is highly particularized, constituting, in effect, "individualized rule-making." *Id.; see Bergen County Pines Hosp., supra,* 96 *N.J.* 456, 476; *Boller Beverages, Inc., supra,* 38 *N.J.* 138, 151–52. Other agency proceedings that involve contested, quasi-judicial hearings effectuate agency regulatory jurisdiction and can be characterized as "generalized adjudication." *See, e.g., R.H. Macy & Co., Inc., supra,* 41 *N.J.* 3; *see also In re Uniform Admin. Procedural Rules,* 90 *N.J.* 85, 92 (1982). Nevertheless, rule-making and adjudication are not interchangeable. If the several relevant features that typify administrative rules and rule-making weigh in favor of action that is quasi-legislative in character, rather than quasi-judicial or adjudicatory, that balance should determine the procedural steps required to validate the ultimate agency action.

In the instant case, the Director claims that *N.J.S.A.* 54:10A–8 empowers him to adjust the allocation factor determined pursuant to *N.J.S.A.* 54:10A–6. He maintains that his

determination—rendered as an *ad hoc* decision resulting in an adjudication in a contested case—was sufficiently specifically authorized by the Act so as to obviate the need for any additional implementing regulations. *See Equitable Life Mortgage & Realty Investors v. Div. of Taxation,* 151 *N.J.Super.* 232, 240 (App.Div.1977), certif. den., 75 *N.T.* 535 (1977).

The Appellate Division agreed, 187 *N.J.Super.* at 565, and reversed the Tax Court's conclusion that, absent agency rules or regulations, the Director lacked the authority to assess a deficiency based upon the audience share factor. The Appellate Division relied on *R.H. Macy & Co., Inc., supra,* 41 *N.J.* 3, where the court upheld the Director's action in adjusting, without any implementing regulations, the method of valuing Macy's inventory for purposes of computing net worth under *N.J.S.A.* 54:10A–4(d). Although *R.H. Macy & Co., Inc., supra,* supports the general proposition than an ageny may make decisions with substantive effect without prior promulgation of a rule or regulation, there were two features that supported that result. One was the recognition that the determination might not be of unvarying application in all similar cases. The other was the accepted adequacy and specificity of the legislative standard in guiding the particular administrative decision. *Id.* In *Airwork, supra,* 97 *N.J.* 290, decided today, we reached a similar conclusion, holding that where the tax statute addressed the transaction with sufficient specificity, an implementing rule was not a prerequisite to the exercise of the Director's statutory authority.

It does not follow that, because the Director has statutory discretion, the *manner* in which this discretion is exercised is not governed by the standards that determine whether rule-making or adjudication must be followed in a given case. We have acknowledged that this procedural choice itself is highly discretionary, and that agencies have wide latitude in improvising appropriate procedures to effectuate their regulatory jurisdic-

tion. *See Bally Mfg. Corp., supra,* 85 *N.J.* at 338 ("Administrative agencies enjoy a great deal of flexibility in the proceedings most suitable to achieving their regulatory aims."); *Heir v. Degnan,* 82 *N.J.* 109, 121 (1980). Further, we have noted that both the rule-making and the adjudicatory mode serve to effectuate legislative and administrative policy, *In re Uniform Admin. Procedural Rules, supra,* 90 *N.J.* at 92. Nevertheless, this discretion is not unbounded. *See N.J.S.A.* 52:14B–2(b), (c), (e). The standards that we have developed set its outer limits and control the choice of proceedings. *See, e.g., Crema, supra,* 94 *N.J.* at 299 ("When the agency is concerned with "broad policy issues" that affect the public-at-large or an entire field of endeavor or important areas of social concern, or the contemplated action is intended to have wide application and prospective effect, rule-making becomes the suitable mode of proceeding."); *Boller Beverages, Inc., supra,* 38 *N.J.* at 155; *see also N.L.R.B. v. Bell Aerospace Co.,* 416 *U.S.* 267, 294, 94 *S.Ct.* 1757, 1771, 40 *L.Ed.*2d 134, 154 (1974) ("[T]here may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act.").

[16] In balancing the relevant factors before us, we are satisfied that the instant agency determination constituted a rule, and that its adoption required compliance with statutory rule-making procedures. The challenged determination clearly is one of general applicability to the regulated class. It is essentially prospective in nature, notwithstanding its attempted application to the taxpayer in this case. It was intended to have continuing effect, since, as the Director conceded, the audience share factor applies to all other broadcasters similarly situated to Metromedia. The Director admitted at trial that "[a]ll broadcasters* * * who are in the same predicament or situation as [Metromedia] would be subject to the revision." There is no question, therefore, that the determination is intended to be a rule of unvarying application to all similar cases.

[17] Further, the determination was not otherwise expressly provided for by the statute, nor was it clearly and obviously implied. On this point, we note that the New York State courts, in *Conde Nast Publications, Inc. v. State Tax Comm'n, supra,* 51 *A.D.*2d 17, 378 *N.Y.S.*2d 132, and *Capital Cities Communications, Inc. v. State Tax Comm'n, supra, 65 A.D.*2d 25, 411 *N.Y.S.*2d 46, rejected the argument that the express language of the New York legislation empowering the tax commission to adjust the allocation percentage (based upon the three factors of payroll, property and receipts, *N.Y.Tax Law* § 210(3)(a)), authorized the substitution of an audience share approach. Significantly, the New York legislation, *N.Y.Tax Law* § 210(8) (McKinney 1979), which so empowers the tax commission, contains language that is virtually identical to the language of *N.J.S.A.* 54:10A–8(e). Subsequently, the New York authority enacted regulations, *N.Y.Tax Reg.* § 4–4.3(f)(2), pursuant to New York's Administrative Procedure Act, which provide for the use of an audience share factor when calculating the receipts fraction.

[18] In addition, the Director's determination reflects an interpretation of the enabling law and constitutes a decision on administrative policy, comporting with the general definition of a rule under the APA, *N.J.S.A.* 52:14B–2(e). The resolution of issues implicated in such a determination is made most appropriately by invoking procedures designed for the adoption of administrative rules. *See Dougherty v. Dept. of Human Servs., supra,* 91 *N.J.* 1; *Texter v. Dept. of Human Servs., supra,* 88 *N.J.* 376. That did not occur in the proceedings leading to the Director's determination here. The Tax Court recognized that while the audience factor was conceptually reasonable as related to the allocation of revenues, "there was no specific proof in this regard." 3 *N.J.Tax* at 414. Also, it is of some significance that the Committee on State Tax Policy, in its review of the Act and the allocation tax policy formula, believed that the subject mat-

ter was legislative or quasi-legislative in character and therefore suitable for rule-making. It "recommend[ed] that the Standing Committee of Tax Legislation * * * *"

> review the existing apportionment formula and practices, as applied to specialized industries; that it analyze the amount of revenues collected from such industries; and devise and *recommend*, where appropriate, the *enactment of legislation or the promulgation of regulations of apportionment and allocation methods*, which will more fairly reflect the activities, income and net worth, of such industries attributable to the State. [Tax Policy Report at 32 (emphasis added).]

[19] Further, the agency determination did not itself arise from the development of an evidential record that characterizes adjudication. The Tax Court's discussion of the agency's adoption of the audience share factor and its application to Metromedia in the form of a tax assessment instructively draws the distinction between a "rule" and an adjudicatory "finding."

> The audience factor adopted by defendant * * * is * * * an agency statement that will apply generally to all similarly situated broadcasters, and which implements and interprets both law and public policy. It does not, as defendant maintains, come within the exclusion for "agency decisions and findings in contested cases." This is so because the audience factor employed by defendant represents neither a decision nor a finding of the Division of Taxation. All that can be properly characterized as a decision or finding is defendant's ultimate conclusion as to plaintiff's liability. The audience factor was * * * a rule of general applicability employed by defendant to permit him to make findings and render a decision in this case. Defendant's "decision" * * * was that plaintiff owed additional franchise taxes for the tax years in question, and not that an audience factor is the proper tool with which to allocate such taxes for an out-of-state broadcaster such as plaintiff. [3 *N.J.Tax* at 406.]

Consequently, the Director's determination is not excepted from the APA definition of a rule as an "agency finding in [a] contested case." *N.J.S.A.* 52:14B–2(e).

[20] *N.J.S.A.* 54:10A–27 empowers the Director to implement rules and regulations in conjunction with the statutory authority. The broad language of *N.J.S.A.* 54:10A–8(e) and the subject matter of the agency's proceedings involved in

this case offer a prime example of where "[t]he function of filling in the interstices of [legislation] should be performed, as much as possible, through [the] * * * promulgation of rules to be applied in the future." *Securities & Exchange Comm'n v. Chenery, supra,* 332 *U.S.* at 202, 67 *S.Ct.* at 1580, 91 *L.Ed.* at 2002. The necessity, as well as desirability, of administrative rule-making in this context is supported by this Court's reasoning in *Boller Beverages, Inc., supra,* 38 *N.J.* at 151–52:

> The theory of administrative rule-making is, of course, that in certain fields and in certain respects the public interest is better served by delegating a large part of detailed lawmaking to the expert administrator, controlled by policies, objects and standards laid down by the legislature, rather than by having all the details spelled out through the traditional legislative process. Administrative rule-making remains in essence, however, the enactment of legislation of general application, prospective in nature. The object is not legislation *ad hoc* or after the fact, but rather the promulgation, through the basic statute and the implementing regulations taken as a unitary whole, of a code governing action and conduct in the particular field of regulation so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance. Without sufficiently definite regulations and standards, administrative control lacks the essential quality of fairly predictable decisions. Persons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong from its hindsight conception of what the public interest requires in the particular situation.

This reasoning applies with similar force to the agency action that is the subject of this appeal. Accordingly, we find that the action taken by the Director, despite reliance upon statutory authority, is nonetheless invalid absent the prior promulgation of rules in compliance with the Administrative Procedure Act. *See Crema, supra,* 94 *N.J.* at 299.

IV

In conclusion, we recognize that the language of the New Jersey Corporation Business Tax Act grants the Director needed

broad authority to modify the statutory formula for determining a multi-state taxpayer's New Jersey tax base by which the tax is measured. In a case such as this, involving a multi-state radio and television enterprise reaching audiences in several states, the language of the statute supports the determination of a more realistic method than provided by the statutory three-ply formula to calculate the receipts of the taxpayer that can fairly and reasonably be attributable to its activities in New Jersey. The "audience factor" is based upon a presumed economic correlation between revenues derived from advertising over the taxpayer's network and the size and location of its viewing and listening audiences. It would constitute a fair and appropriate method for allocating revenues. The actual determination to use such an allocation method, however, requires implementing regulations and recourse to rule-making procedures.

In reaching this conclusion, we have noted but determined not to address taxpayer's constitutional claims. The record is insufficient with respect to these claims, the lower courts did not resolve them, and, in light of our determination requiring further administrative proceedings, these claims may again be asserted. These considerations reinforce the Tax Court's conclusion that the Director's determination, in the form of the tax assessment against Metromedia, and the adoption of the audience share factor to make this assessment, applied without complying with the requirements of the APA governing the promulgation of administrative rules and regulations, was invalid.

Accordingly, the Appellate Division's judgment is reversed and the Tax Court judgment is affirmed.

Reversed.

WILENTZ, Chief Justice, and POLLOCK and O'HERN, Justices, dissenting:

We would affirm the judgment of the Appellate Division, substantially for the reasons expressed by Judge Furman in his opinion reported at 187 *N.J.Super.* 562.

For reversal—Justices CLIFFORD, SCHREIBER, HANDLER and GARIBALDI—4.

For affirmance—Chief Justice WILENTZ and Justices POLLOCK and O'HERN—3.

MOTION FILED
APR 22 1985

No. 84-1506

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AIRWORK SERVICE DIVISION,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF CONSUMER BUREAU IN SUPPORT OF THE PETITIONER

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In the

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF CONSUMER BUREAU[1] IN SUPPORT OF THE PETITIONER

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Consumer Bureau respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The written consent of the attorney for the petitioner herein has been obtained, but the attorney for the respondent herein has refused to consent to the filing of a brief by Consumer Bureau as *amicus curiae*.

The interest of Consumer Bureau is described in the accompanying brief. The brief of the petitioner herein in the New Jersey

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[1] Joseph M. Boyd, of Princeton, N.J., President of Consumer Bureau, is also majority stockholder of The Princeton Community Phone Book, Inc., a New Jersey corporation.

Supreme Court and its petition for a writ of certiorari do not adequately address one element of the substantive due process issue present in this case that is of primary concern to Consumer Bureau, namely:

> *whether, without violation of their right to due process of law, persons who are conscripted to serve as sales tax collectors for any state may be held retroactively liable to pay out of their own pockets sales taxes on transactions which took place at a time when the latest printed and published statements of the state's own tax authorities declared such transactions to be exempt from sales tax.*

Consumer Bureau does not believe that the argument on this point will be expanded and be made complete in this Court unless leave is granted to Consumer Bureau to participate. If Consumer Bureau's argument is accepted by this Court, the decision of the New Jersey Supreme Court must be reversed.

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BRIEF OF AMICUS CURIAE CONSUMER BUREAU IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

STATEMENT OF THE INTEREST OF AMICUS CURIAE

Having obtained leave of the New Jersey Supreme Court to do so, Consumer Bureau participated in argument below, along with the American Civil Liberties Union of New Jersey, as *amicus curiae*, in which capacity Consumer Bureau briefed extensively the constitutional issues which had been raised in this matter in the lower courts and presented these issues also in oral argument before the New Jersey Supreme Court. Positions adopted in this litigation by *amici curiae* Consumer Bureau and the American Civil Liberties Union of New Jersey were thereafter extensively represented in the vigorous dissenting opinion of Justice Garibaldi, in which two other members of that court joined. *Airwork Service Division v. Director, Division of Taxation*, 97 N.J. 290, 478 A.2d 729 (1984).

Consumer Bureau's interest in the subject matter of this proceeding is limited to an issue which is necessarily included within the Question Presented for Review by Airwork in its Petition.[2] That issue is:

> *whether, without violation of their right to due process of law, persons who are conscripted to serve as sales tax collectors for any state may be held retroactively liable to pay out of their own pockets sales taxes on transactions which took place at a time when the latest printed and published statements of the state's own tax authorities declared such transactions to be exempt from sales tax.*

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2. Petitioner Airwork has presented the following question for review:

> May the New Jersey Division of Taxation, consistent with the due process clause of the Fourteenth Amendment, retroactively assess sales taxes against a New Jersey vendor based upon a changed interpretation of the law, which change was adopted without notice or an opportunity to comment in violation of the New Jersey Administrative Procedure Act?

Petition at "i"

Reflecting its urgent interest in the outcome of the *Airwork* case, Consumer Bureau appeals to this Court to prevent the New Jersey Supreme Court's *Airwork* decision from becoming a settled precedent which, in Consumer Bureau's view, would be a continuing disaster for the nationwide army of unpaid state sales tax collectors, very few of whom can afford at any level the cost of a court test of their constitutional right to due process.

Consumer Bureau is a corporation organized and existing under the laws of the state of New Jersey with its principal place of business at 152 Alexander Street, Princeton, New Jersey. Consumer Bureau has continuously since 1967 conducted a consumer information and assistance service similar in some respects to parallel services provided by Better Business Bureaus. Like a Better Business Bureau, Consumer bureau is financed in large measure by local business people who choose to join Consumer Bureau as dues-paying members. One interest which applicant seeks to assert in this proceeding is its own in that, like most organizations conducting business of any kind in New Jersey, applicant must deal on a regular basis with agencies of the state and must comport itself in harmony with applicable statutes and regulations, including those which concern taxes and their application. More importantly, since applicant's community services are primarily financed by its business members who deal directly with consumers and are therefore deeply involved in one way or another with administration of the New Jersey Sales Tax Act, N.J. Stat. Ann. 54:32B-1 *et seq.*, and its interpretation, applicant has a strong collateral interest in protecting its members and other local business people from the arbitrary, capricious and extremely damaging tactic reflected in the case at bar and to which petitioner Airwork Service Division (hereafter, "Airwork") has been subjected by the Tax Division and the courts of the state of New Jersey. The issue set forth above is of substantial public importance.

REASONS WHY THE PETITION SHOULD BE GRANTED[3]

The New Jersey Supreme Court in this case has decided that official printed and published instructions of the Tax Division of the Department of the Treasury of the State of New Jersey, systematically distributed by the agency to businesses in New Jersey and released to Commerce Clearing House for publication, can be declared "unofficial" retroactively to the severe detriment of persons affected thereby. The New Jersey Court has thereby handed to New Jersey's Division of Taxation (and any other agency whose retroactive decisions are capable of having a similarly draconian effect) a license to ignore the most fundamental concepts of due process. That there is no hyperbole in the preceding statement is evident when one considers the potential effect on any business which will necessarily occur if it follows the instructions of a relevant regulatory authority in the conduct of its business only to be told later that it should not have followed them and that it is to be punished for having done so.

The facts relevant to the New Jersey Supreme Court's holding are not in dispute:

1. The New Jersey Sales and Use Tax Act was passed in 1966 and shortly thereafter instructions to sales tax collectors were published and distributed in which the transactions which are the subject of this litigation were declared to be exempt;

2. Airwork refrained from collecting taxes on the subject transactions and was audited by the Tax Division during the relevant period, such audit finding no deficiencies in Airwork's collection of sales taxes;

3. The policy of the Division of Taxation respecting the applicability of sales tax to the subject transactions was officially

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3. Amicus Curiae Consumer Bureau incorporates herein by reference the statement of the case contained in the Petition for Writ of Certiorari filed by Airwork Service Division.

changed in 1973 by notice in the *State Tax News*, following which notification Airwork immediately began collecting taxes on the subject transactions; and,

4. The Tax Division, despite the fact that the announcement was made in 1973, retroactively assessed Airwork over $600,000 in sales taxes which Airwork did not collect during the period in which the state's instructions had been to not collect the tax.[4]

It should be noted here that, in order for Airwork to have avoided what amounts to a $600,000 fine for *obeying* the New Jersey Tax Division's own published instructions, it would in a competitive market have been obliged to take the bizarre position of collecting from its out-of-state customers New Jersey sales taxes at a time when the latest published position of the New Jersey Tax Division was that the services were not subject to New Jersey sales taxes.

In determining that Airwork should have known better than to rely on the State's own instructions, the New Jersey Supreme Court held that the Division's publication was "not shown to be an official statement or pronouncement."[5] *Airwork Service Divi-*

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4. In its decision, the New Jersey Supreme Court made the statement that, prior to the notice in the *State Tax News*, the issue of the taxability of these transactions was resolved in the case of *Fisher-Stevens, Inc. v. Director, Division of Taxation*, 121 N.J. Super. 513, 298 A.2d 77 (App. Div. 1972), *cert. denied*, 62 N.J. 575, 303 A.2d 328 (1973). *Airwork Service Division v. Director*, 478 A.2d at 731, Petition at 6a. The New Jersey Supreme Court's citation of this case is a mystery, not only because the assessment in question reached back to a period prior to publication of the *Fisher-Stevens* decision, but also because a careful analysis of that decision reveals not only that its holding was entirely irrelevant to the transactions in question in this case, but if anything, it implied that the transactions in this case continued to be exempt. At the very least, *Fisher Stevens* is without any arguable factual significance in the context of this proceeding.

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5. The court below made the additional puzzling assertion that, during the relevant period, "[i]t was—or should have been—well known to similarly situated taxpayers that the Division of Taxation was vigorously taking the position that such services were taxable." *Airwork Service Division v. Director, Division of Taxation*, 478 A.2d at 731, Petition at 6a. The Court below did not suggest how Airwork was to have gained this knowledge, nor did the Court identify any legal theory upon which to base its assertion that a taxpayer has the responsibility to seek out and keep abreast of the current state of Tax Division policies. There is in addition no evidence in the record to establish that the Tax Division had in fact adopted the position that subject services were taxable. In fact, the evidence in the record is quite to the contrary.

sion v. Director, Division of Taxation, 97 N.J. 290, 478 A.2d 729, 733 (1984) [at 9a of Airwork's Petition for a Writ of Certiorari, hereinafter "Petition _____"]. It is the position of *amicus* Consumer Bureau that the New Jersey Supreme Court's suggestion in this regard—that the public is somehow possessed of a duty to determine which agency pronouncements are "official" and which are "unofficial" in the conduct of its affairs—is on its face not only in flagrant disregard of Airwork's right to due process but is an open invitation to all state agencies in New Jersey to free themselves from the constraints of the State's Administrative Procedures Act, N.J. Stat. Ann. 52:14B-1 *et seq*., and from the due process clause of the fourteenth amendment to the United States Constitution.

This Court addressed similar circumstances in *Central Illinois Public Service Co. v. United States*, 435 U.S. 21 (1978). In that case, an employer was sought to be held liable retroactively for withholding taxes on meal reimbursements to employees. The employer had refrained from withholding such taxes during a period when there had been no regulatory requirement to do so. Although the court rejected the Internal Revenue Service's retroactive assessment on other grounds, the majority opinion and concurring opinions made it clear that this Court doubted the constitutionality of the Internal Revenue Service's attempt to subject the employer to the same sort of conduct to which Airwork has been subjected in this case. The majority opinion stated:

> An imposition of withholding responsibility on the Company for the lunch reimbursements as far back as 1963 strikes us as somewhat retroactive in character and almost punitive in light of the facts of this case.

435 U.S. at 33, n. 12. The concurring opinion by Justice Stevens, joined in by Chief Justice Burger and Justice Powell, reiterated the same concern:

> I write separately to state more fully my views on why petitioner cannot be subjected *retroactively* to withholding tax on the theory—whether correct or not—espoused here by the government . . .
>
> Those who administer the Internal Revenue Code unquestionably have broad authority to make tax

> rulings and regulations retroactive. *See* 26 U.S.C. §7805(b). . . That authority is not unfettered, however, and conditions are present here that would make retroactive application of the withholding tax to petitioner's lunch payment an abuse of discretion.

435 U.S. at 34-35.

> [W]ithholding taxes should not, at least without good reason, be assessed against employers who did not know of and who had no reason to know of increased withholding obligations at the time wages had to be withheld.
>
> Such notice, as the Court holds, ante . . . was not given petitioner until at least 1967 and, for all that appears, possibly not until our decision in *Commissioner of Internal Revenue v. Kowalski*, 434 U.S. 77 (1977) . . . [T]he likely effect [of upholding the Commissioner's decision] would be that the individual taxpayers who should have reported these meal reimbursements in income will be relieved of all taxes they should have paid, and petitioner will bear the tax directly rather than simply acting as a collection conduit for the United States, a result certainly not intended by Congress.

435 U.S. at 38-39. The same conclusion was reached by Justice Powell and Chief Justice Burger in their concurring opinion:

> It seems particularly inappropriate for the Commissioner, absent express statutory authority, to impose retroactively a tax with respect to years prior to the date on which taxpayers are clearly put on notice of the liability. In other areas of the law, "notice," to be legally meaningful, must be sufficiently explicit to inform a reasonably prudent person of the legal consequences of failure to comply with the law or regulation. In view of the complexities of Federal taxation, fundamental fairness should prompt the Commissioner to refrain from the retroactive assessment of a tax in the

> absence of such notice or of clear Congressional authorization.

435 U.S. at 39. The majority and concurring opinions in *Central Illinois Public Service Co.* indicate that at least eight members of this Court would have rejected as fundamentally unfair the position of the Division of Taxation of the State of New Jersey in the case at bar.

The Court's concern with punitive retroactivity in its opinion in *Central Illinois Public Service Co., supra*, is a recent manifestation of a concern which was expressed by this Court many years ago. In *Welch v. Henry*, 305 U.S. 134 (1938), the Court enunciated the starting point for an analysis of the constitutionality of retroactive imposition of taxes:

> In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

305 U.S. at 147

This Court's concern with the interplay of the due process clause and retroactive governmental conduct was expressed again and elaborated in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), in which the Court rejected a claim by coal mine operators that the due process clause barred the imposition of liability on them for pneumoconiosis contracted by former employees.

> It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Thus, in this case the justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger of their employees contracting pneumoconiosis and that even if they did know of the danger their conduct may have been taken in reliance

> upon the current state of the law which imposed no liability on them for disabling pneumoconiosis.

428 U.S. at 17-18, and:

> Whether or not a person who could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct has been significant in at least one line of cases in this Court. In *Welch v. Henry*, 305 U.S. 134, the Court upheld against a due process attack a state statute enacted in 1935 taxing 1933 dividend income that the 1933 taxing statute had explicitly exempted. Adopting the view that a stockholder would have continued to receive corporate dividends even if he knew that the dividends would subsequently be taxed, the Court distinguished prior cases invalidating the retroactive taxation of gifts on the ground that the donor might have refrained from making the gift had he anticipated the tax.

428 U.S. at 18, n. 16.

Ingredients of the due process test, derived from *Central Illinois Public Service Co., Welch v. Henry,* and *Usery v. Turner Elkhorn Mining Co.*, can include whether the state's retroactive activity has a "punitive" effect *or* whether the citizen would have altered his or her conduct during the relevant period had the citizen been aware of the impending alteration of the government's requirements.

In Airwork's case, both ingredients are present. The imposition on Airwork of its customers' sales taxes is punitive by its very nature. *Cf.*, N.J. Stat. Ann. 54:32B-14; 54:32B-12. Second, the record of this case demonstrates beyond a shadow of a doubt that Airwork would have collected the taxes from its customers during the relevant period had it not been instructed to refrain.[6] Thus, the

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6. An analogy to the case at bar can be found in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), *reh'g denied*, 431 U.S. 975 (1977). In that case, this Court held that statutes could form elements of contracts and that repeal of those statutes, after citizens have relied on them, may impair the obligations of a contract contrary to art. I, §10, cl. 1, of the Constitution. The State's inability to impair the obligations of a contract between private persons was held in *United States Trust Co. of New York, supra*, to apply equally to the impairment of the state's own contracts. 431 U.S. at 18. At least one lower court

New Jersey Supreme Court's decision in *Airwork* is at war with the United States Supreme Court decisions cited above. In addition, it is at war with decisions in other states. *Illinois Bell Telephone Co. v. Allphin*, 95 Ill. App.3d 115, 419 N.E.2d 1188 (1981), *aff'd*, 93 Ill.2d 241, 443 N.E.2d 580 (1982); *Appeal of Denman*, 120 N.H. 568, 419 A.2d 1084 (1980); *Department of Revenue v. Family Hospital, Inc.*, 105 Wis.2d 250, 313 N.W.2d 828 (1982).

Although this Court recently held in *United States v. Darusmont* 449 U.S. 292 (1981) that the due process clause does not prevent the retroactive alteration of income tax rates, the *Darusmont* opinion's language makes it evident that the contrary result would have been achieved in the *Airwork* case because Airwork, in contradistinction to *Darusmont* had "no reason to suppose that [the] transactions . . . [would] be taxed at all." 449 U.S. at 300. Indeed, this Court in *Darusmont* was careful to emphasize that the only effect on the taxpayer of the change in tax rate was the taxpayer's failure to take advantage of a more favorable rate while he still could. The logic of *Darusmont* dictates that the opposite result would be called for where, as here, Airwork was not intended to be the taxpayer in the first place, was misled by the state itself to believe that the subject transactions would not be taxed at all is now being punished for heeding the state's own instructions—a far cry from being asked to pay the fair share of someone who is "privileged to enjoy the benefits of government." 449 U.S. at 299.

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has held that the rationale of *United States Trust Co. of New York, supra*, applies to regulations as well as to statutes. *Smith v. Sorensen*, 748 F.2d 427 (8th Cir. 1984). The analogy between the facts in *United States Trust Co. of New York* and those in the case at bar is easily drawn since the relationship between the State of New Jersey and its citizen tax collectors—the retail merchants, including Airwork—is more one of contract than a relationship of taxing authority and taxpayer. This is so because Airwork is not the taxpayer of sales taxes under New Jersey's statutory scheme but is rather a citizen who, as a condition of engaging in retail trade within the state, is obliged to contract with the state to collect the state's sales taxes from consumers. N.J. Stat. Ann. 54:32B-12(a). To say, as the New Jersey Supreme Court has said, that the state is free to alter retroactively its contract with Airwork is to ignore Airwork's reliance interest in the State's published instructions and the massive and certain detriment suffered by Airwork as a result of the retroactive change, the latter element in marked contrast to the bondholders' somewhat conjectural interest in *United States Trust Co. of New York, supra*.

JURISDICTION

Although the New Jersey Supreme Court concluded its opinion in this case with the statement that the Constitutional issues raised by Airwork "were not determined by the courts below" and declined to rule on them, the record in this case makes it clear that the contrary is correct. The decision by the Tax Court of New Jersey specifically listed the following in its recitation of the issues presented on appeal:

> 2. Did defendant's failure to comply with the notice and hearing provisions of the APA deny plaintiff due process of law?

2 N.J. Tax at 339. The Tax Court, citing this Court's decisions in *Central of Georgia R.R. Co. v. Wright*, 207 U.S. 127 (1907), *Gallup v. Schmidt*, 183 U.S. 300 (1902), and *Williams v. Eggleston*, 170 U.S. 304 (1898), concluded that Airwork's right to due process of law was entirely satisfied by affording it an opportunity to litigate the propriety of the tax and its retroactive imposition. *Airwork Service Division v. Director, Division of Taxation*, 2 N.J. Tax. 329, 342 (1981). The decision of the Tax Court was affirmed by the Appellate Division of the New Jersey Superior Court without significant comment. 4 N.J. Tax 532 (1982). Why the New Jersey Supreme Court would conclude that Airwork's due process claim was not raised or argued below and why the court would cryptically recommended to Airwork that it pursue its Constitutional claims "before an appropriate tribunal if it chooses to do so" is mystifying, particularly in light of the undisputed nature of the relevant facts. Nonetheless, the New Jersey Supreme Court's refusal to address the Constitutional claim should not bar this Court's consideration of the issue. To find otherwise would enable any state court to prevent review of such claims by the simple expedient of refusing without explanation or basis to consider them.

In the context of a case arising from the administration of state tax laws, the New Jersey court's refusal to hear the constitutional claims is particularly troubling, because access to Federal courts when state tax matters are involved is virtually foreclosed *except* by writ of certiorari in this Court. 28 U.S.C. §1341; *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981).

CONCLUSION

This Court should grant Airwork's Petition for a Writ of Certiorari because the New Jersey Supreme Court has decided a Federal question in a way which is in conflict with the decisions of this Court and with the decisions of other state courts of last resort. If not reversed, the decision by the New Jersey Supreme Court in *Airwork v. Director* will serve as a convenient blueprint for officials of any state to avoid the most elemental dictates of the due process clause of the Fourteenth Amendment to the United States Constitution and will serve as a boobytrap for any citizen of the State of New Jersey who is unfortunate enough to abide by the state's own directives.

Respectfully submitted,

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Re: Airwork Service Division vs.
Director, Division of Taxation

Dear John:

As you are aware, we have filed a Petition for a Writ of Certiorari with the United States Supreme Court on behalf of Airwork Service Division.

We note that Supreme Court Rule 36.1 provides for the filing of a brief by an amicus curiae upon written consent of the parties. In that regard, we hereby consent to your participation in this matter on behalf of the Consumer Bureau if you so decide.

Very truly yours,

GERALD C. NEARY

GCN:mo

MOTION FILED
APR 22 1985

No. 84-1506

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

AIRWORK SERVICE DIVISION,
Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

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DIRECTOR, DIVISION OF TAXATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States ("Chamber") hereby moves for leave to file the attached brief *amicus curiae* in this case pursuant to Supreme Court Rule 36.1. This brief is filed in support and with the written consent of Petitioner Airwork Service Division ("Airwork").[1] The consent of Respondent Division of Taxation ("Tax Division") was requested but refused, thus making this motion necessary.

The Chamber is the largest federation of business organizations and individuals in the United States. The

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[1] A copy of the consent letter is being filed with the attached brief.

Chamber's current membership exceeds 184,000, including over 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and local and state chambers of commerce. The Chamber regularly advocates its members' views in court and before administrative agencies on issues of national concern to the American business community. The Chamber's interest in tax issues is well-established.[2]

This case involves the retroactive assessment of state sales taxes against companies that render services to out-of-state customers.[3] At issue is a constitutional question of vital concern to the business community, that is, whether the retroactive imposition of sales taxes based on a revised interpretation of law, adopted without notice and in violation of the state's Administrative Procedure Act, violates the constitutional guarantee of due process of law.

The Chamber opposes the concept of retroactive law enforcement, and has participated in several cases advocating the reversal of government actions with retro-

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[2] The Chamber has submitted comments to administrative agencies on tax matters, and has participated as an *amicus* in several cases before this Court on tax issues. *See, e.g.*, Comments of the Chamber of Commerce of the United States on *Proposed Regulations Relating to the Limitation on the Amount of Depreciation and Investment Tax Credit for Automobiles and the Limitation when Certain Property is Used for Personal Purposes* (December 12, 1984); *United States* v. *Arthur Young Co.*, 104 S.Ct. 1495 (1984) (confidentiality of tax analysis work papers); *El Paso Co.* v. *United States, cert. denied*, 52 U.S.L.W. 3756 (U.S. April 16, 1984) (same issue as *Arthur Young*); *Thor Power Tool Co.* v. *IRS*, 439 U.S. 522 (1979) (whether the IRS should accept for tax purposes certain inventory and accounting methods).

[3] That the impact of this problem extends beyond the Petitioner is evidenced by the Petition for Writ of Certiorari to the New Jersey Supreme Court filed in *S.G. Frantz Co.* v. *Director, Division of Taxation*, No. 84-1504 (U.S. Mar. 22, 1985), currently pending before this Court.

active effect.[4] The Chamber believes that, in order to comply with regulatory programs, businesses need to know on a timely basis what conduct is permitted and what is proscribed by the regulations applicable to their operations. This is particularly important with the collection of sales taxes, because sellers have only one opportunity to collect sales taxes, that is, at the time of sale. Once the sale is complete, it is often too late to collect the tax, especially when services are provided to out-of-state customers. Accordingly, businesses must know in advance whether they are expected to collect sales taxes for such services, rather than learning about policy changes through retroactive assessments by the state taxing authority.

In keeping with traditional notions of fundamental fairness, government agencies have an obligation to notify businesses of what the law is *before* it is enforced against them. The New Jersey Tax Division failed to meet this obligation when it reversed its policy on sales tax collection without notice, and retroactively assessed uncollected sales taxes against a company that relied on a prior published policy statement. This retroactive assessment is offensive to constitutional principles of due process.

In many jurisdictions, sellers are charged with the responsibility of collecting sales taxes from their customers for the government. In their efforts to comply with these requirements, businesses must be able to rely on official published statements of policy issued by taxing authorities. The notion that surprise retroactive tax assessments

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[4] *See, e.g., Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, —— U.S. ——, 104 S.Ct. 2709 (1984) (successful challenge of the retroactive application of the Multiemployer Pension Plan Amendments Act of 1980); *United States* v. *Exxon Corporation, appeal pending*, No. DC-93 (Temp. Emer. Ct. App. 1983) (challenging the retroactive application of Department of Energy rules regarding price controls).

may be made based on the taxing authority's most current interpretation of the law violates the most fundamental concepts of due process. Moreover, such assessments shift the burden of the sales tax from the customer to the vendor, converting the business from tax collector to taxpayer.

As the principal voice of the American business community, the Chamber is well-suited to present the broad interest of business in this case. The Chamber believes it is important for this Court to recognize the significance of these tax issues to business as a whole and, therefore, respectfully requests leave to file the attached brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1506

AIRWORK SERVICE DIVISION,
Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief *Amicus Curiae* for a statement of its interest in this proceeding.

INTRODUCTION

American businesses are subject to a number of federal and state regulatory programs. In order to function efficiently and in compliance with applicable regu-

lations, they must be able to readily ascertain the meaning of those regulations. Without clarity, companies cannot determine whether their business decisions are lawful or unlawful. While it is unquestionably the duty of American businesses to comply with the law, it is the duty of the government to make clear what the law is, in advance, so that companies can comply with it. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Clear regulations are especially important when they involve the collection of sales taxes, a one-time activity occurring only at the time of sale. The New Jersey Division of Taxation ("Tax Division"), as detailed below,[1] failed to make its requirements clear, and now seeks to make Petitioner Airwork Service Division ("Airwork") bear the burden of its failure.

In 1966, the Tax Division issued an "Official News Release" which provided that charges for repairs to articles delivered out of state were exempt from the state sales tax.[2] No vendor, viewing this statement, could reasonably have suspected that a taxing obligation existed for such services.[3] In 1973, the Tax Division published a statement reversing its prior position, ruling that the services were subject to the tax. From 1966 to 1973, the Division gave no notice of any kind of its change in policy. The 1966 release was neither with-

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[1] A brief restatement of the facts is necessary to adequately present the fairness issue to this Court.

[2] The Tax Division was under no obligation to "assert a particular position as soon as the statute authorize[d] such an interpretation." *Dickman* v. *Commissioner*, —— U.S. ——, 104 S. Ct. 1086, 1094 (1984). But the Division did assert an official position in 1966, and issued a news release to publicize it.

[3] The Division's "Official News Release" stated:

> Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser outside the State for use outside the State are exempt from the sales tax.

drawn nor corrected. Moreover, the Tax Division audited Airwork during that period and did not assess the company for any tax deficiency.

In 1973, the Tax Division assessed Airwork for more than $600,000 in uncollected sales taxes, contending that the company should have known of its change in policy. This assessment had the effect of requiring the company to pay out of its own pocket taxes which it would have collected from its customers, had it *not* followed the Tax Division's own written directive on the issue. The fundamental unfairness of this result is striking, and the intervention of this Court is needed to protect the company's constitutional right to due process of law.[4]

ARGUMENT

I. THIS RETROACTIVE ASSESSMENT OF UNCOLLECTED SALES TAXES VIOLATES AIRWORK'S FOURTEENTH AMENDMENT RIGHTS.

The Due Process Clause of the Fourteenth Amendment prohibits the states from depriving any person of life, liberty or property without due process of law. New Jersey's retroactive assessment against Airwork of sales taxes the company did not collect in reliance on the Tax Division's "Official News Release" is repugnant to this constitutional guarantee.

Pursuant to the doctrine of substantive due process, "governmental deprivations of life, liberty or property

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[4] Also at issue is the constitutionality of imposing sales taxes on nonresident purchasers of services performed in state and delivered out-of-state under the Commerce Clause, the Equal Protection Clause, and the Due Process Clause. The Chamber believes that these significant issues are thoroughly addressed in the Petition for Writ of Certiorari to the New Jersey Supreme Court filed in *S.G. Frantz Co.* v. *Director, Division of Taxation*, No. 84-1504 (U.S. Mar. 22, 1985), currently pending before this Court. Rather than burdening the Court with a restatement of these arguments, the Chamber respectfully directs the Court's attention to that Petition.

are subject to limitations regardless of the adequacy of the procedures employed." [5] New Jersey's retroactive application of its change in tax policy, adopted without complying with state administrative procedures,[6] so egregiously offends Airwork's due process rights that it compels this Court's review.

In normal circumstances, sales tax liability falls on the purchaser, not the seller.[7] The seller merely collects the tax under the authority and for the benefit of the state, adding it to the price of the goods or services offered.[8] In this case, however, New Jersey has turned tax policy inside out, converting the seller from a tax collector to a taxpayer.

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[5] Comment, *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1166 (1980). *See also, Parrat* v. *Taylor*, 451 U.S. 527, 545 (1980) (Blackmun, J., concurring); *Griswold* v. *Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).

[6] The New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*, mandates the completion of certain notice and comment procedures before a valid administrative rule can be adopted. Absent compliance with these requirements, the Tax Division's change of official policy was invalid, despite reliance on broad statutory authority. *See, Metromedia, Inc.* v. *Director, Division of Taxation*, 97 N.J. 313, 478 A.2d 742, 752 (N.J. 1984) and Airwork's Petition at 8.

[7] Collection of these taxes by the seller is similar to "trust fund taxes," a term of art used to describe, *inter alia*, employment withholding deductions. *See Rosenow* v. *State of Illinois, Dept. of Revenue*, 715 F.2d 277, 279 (7th Cir. 1983).

[8] *See Rosenow* v. *State of Illinois, Dept. of Revenue*, 715 F.2d at 281 and n.6 (the sales tax obligation remains primarily that of the purchaser, who remains liable for the tax if the seller fails to collect it); *Pennwalt Corp.* v. *Metropolitan Sanitary District*, 382 F. Supp. 972, 978 (N.D. Ill. 1973); *Ross Jewelers, Inc.* v. *State*, 260 Ala. 682, 72 So.2d 402 (1953) (the ultimate burden of sales taxes is on consumers, not sellers). *See also, In re Fox*, 609 F.2d 178, 181 (5th Cir. 1980).

This Court has noted repeatedly that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961), *quoting Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). Rather, "fundamental fairness" must be accorded in light of all the circumstances. *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 24-25 (1981).[9] This direct assessment against a taxpayer who followed the taxing authority's published directive in an earnest effort to fulfill its role as sales tax collector offends all notions of fundamental fairness.

This Court has invalidated retroactive taxes when their application is "so harsh and oppressive as to transgress the constitutional due process limitation." *Welch* v. *Henry*, 305 U.S. 134, 147 (1938). This analysis may take into account whether the taxpayer could have altered its behavior to avoid liability if the tax could have been anticipated at the time of the transaction, and whether the taxpayer had notice of the tax. *United States* v. *Darusmont*, 449 U.S. 292 (1981).

Thus, this Court has held retroactive application of a tax so arbitrary and oppressive as to be a denial of due process in cases in which the taxpayer might well have refrained from a particular course of action, had it anticipated the tax.[10] And the Court has invalidated

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[9] *See also, Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (fundamental fairness is what due process means); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. at 162 (Frankfurter, J., concurring) (due process "[r]epresent[s] a profound attitude of fairness between . . . the individual and government").

[10] *See, Coolidge* v. *Long*, 282 U.S. 582 (1931); *Untermyer* v. *Anderson*, 276 U.S. 440, 445 (1927); *Nichols* v. *Coolidge*, 274 U.S. 531, 542 (1926).

retroactive tax determinations as unfair in circumstances where the taxpayer could not reasonably have known of its liability. In *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21, 32 (1978), the Court invalidated the retroactive application of a rule requiring employers to withhold certain taxes from employees' wages. The Court stated: "In 1963 not one regulation or ruling required witholding . . . . No employer, in viewing the regulations, could reasonably suspect that a withholding obligation existed." [11]

Fairness requires administrative agencies to abide by their own rules until they are lawfully changed. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). This is especially true when an individual or company "reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency." *United States* v. *Caceres*, 440 U.S. 741, 752-53 (1979).

Had Airwork known of the Division's change in tax policy, it would have passed this liability to its customers during the years in question. In fact, as soon as the company learned, through the Division's 1973 publication announcing the change, that services to its nonresident customers were indeed taxable, it immediately began to collect sales taxes from those customers.

The New Jersey assessment violates basic notions of fundamental fairness and due process. Its imposition converts Airwork from a state-mandated sales tax collector to a taxpayer, shifting the burden of tax liability from the purchaser to the seller without due process, indeed without any process at all. This result is unconstitutional and must not be allowed to stand.

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[11] *See also, Helvering* v. *Griffiths*, 318 U.S. 371 (1943).

II. THE DECISION OF THE NEW JERSEY SUPREME COURT CONFLICTS WITH THE DECISIONS OF THIS COURT, SEVERAL FEDERAL CIRCUIT COURTS, AND NUMEROUS HIGHEST STATE COURTS.

The New Jersey Supreme Court's decision to uphold the retroactive assessment against Airwork conflicts with a decision of this Court, and with numerous circuit and state court decisions. This conflict alone meets one of the traditional standards for exercise of this Court's jurisdiction and has far-reaching implications for all taxpayers.

In *Central Illinois*, this Court struck down a retroactive assessment of taxes in circumstances analogous to this case. 435 U.S. 21. The decision below directly conflicts with this Court's decision. Accordingly, this Court should grant the petition for review.

In invalidating the retroactive assessment against Central Illinois, this Court found that "imposition of taxes retroactively . . . would not serve the important function of ensuring that all similarly situated taxpayers are assessed equally. Instead, the likely effect would be that . . . petitioner will bear the tax directly rather than simply acting as a collection conduit . . . ." 435 U.S. at 38 (Brennan, J., concurring). The same result obtains in this case. Converted from tax collector to taxpayer, Airwork is required to pay uncollected sales taxes out of its own pocket. The unfairness of this result was recognized by New Jersey's own legislature when it enacted a formal sales tax exemption for repairs provided to out-of-state purchasers. The Committee stated: "Such taxes, when assessed against New Jersey businesses, in many cases incur a loss because they are unable to collect from customers after the fact." Assembly Taxation Committee Statement, No. 1787, L. 1977 c. 54.

Several federal circuit courts also have invalidated retroactive agency determinations on the basis of fair-

ness. Others have noted the sufficiency of process accorded in upholding such determinations. Of particular note are *Lansons, Inc.* v. *Commissioner of Internal Revenue*, 622 F.2d 774 (5th Cir. 1980) and *Briscoe* v. *Kusper*, 435 F.2d 1046 (7th Cir. 1970).

In *Lansons*, the Fifth Circuit refused to permit the IRS to retroactively revoke its determination that the taxpayer's trust plan was a qualified trust. The court noted that the taxpayer had substantially relied in good faith on the Commissioner's determination, and held that retroactive revocation would produce an "inordinate adverse effect." 622 F.2d at 778. The Fourth Circuit approved the same analysis in *Woodward* v. *United States*, 445 F.2d 1204 (1971), *affirming* 322 F. Supp. 332 (W.D. Va. 1971).[11]

In *Briscoe*, the Seventh Circuit emphasized that an agency "may not deviate from . . . prior rules of decision on the applicability of a fundamental directive without announcing in advance its change in policy." 435 F.2d at 1055. Moreover, the court stated, "[u]ntil such time as [the agency] makes public its new determination, it is constitutionally prohibited from imposing that rule on unsuspecting persons." *Id.*

Numerous highest state courts also have invalidated retroactive tax liability on the grounds of due process and fundamental fairness. Many of these cases resemble the case at bar both because of the taxpayers' reliance on prior government actions and their current inability to collect the tax.

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[12] *See also, Wendland* v. *Commissioner of Internal Revenue*, 739 F.2d 580 (9th Cir. 1984) (court noted that the taxpayers had notice of an impending tax policy through a news release and publication of proposed and final versions in the Federal Register, and thus upheld retroactive application). And just this term, this Court noted, in upholding retroactive application of a tax policy, that the taxpayer had notice of it in advance of the contested actions. *Dickman* v. *Commissioner*, 104 S. Ct. at 1094 n.13 (1984).

The Court of Appeals of New York refused to allow a retroactive sales tax assessment in *Hoffman* v. *City of Syracuse*, 2 N.Y.2d 490, 161 N.Y.S.2d 111, 116 (1957), declaring:

> [I]t hardly needs statement that the city is not entitled to hold the liquor dealers liable for the higher sales tax which they could have charged and collected, had the commissioner not directed a contrary course of action during that period . . . . [I]t would be unthinkable to hold [the sellers] responsible for the larger amounts they would have collected . . . .

The Supreme Court of Wisconsin has struck down several retroactive sales tax assessments. In *Wisconsin Department of Revenue* v. *Moebius Printing Co.*, 89 Wis.2d 610, 279 N.W.2d 213, 225 (1979), noting that it was unclear whether the taxpayer could collect the tax retroactively from its customers, the court held that governmental conduct which works a "serious injustice" cannot be permitted. In that case, the taxpayer had not collected the tax in reliance on the post-audit letter of a state auditor, which indicated that the company was doing an "excellent all around job" in complying with the state sales tax law. The court also found it significant that shortly after the tax period at issue, the legislature enacted a sales tax exemption covering precisely the type of sale the state was attempting to tax. As noted above, the New Jersey legislature enacted an exemption from the sales tax at issue here in 1977.

In *Department of Revenue* v. *Family Hospital, Inc.*, 105 Wis.2d 250, 313 N.W.2d 828, 832 (Wis. 1982), the Wisconsin Supreme Court invalidated a retroactive sales tax assessment on a hospital's parking receipts, after the hospital relied on a "technical information memorandum" stating that such receipts were non-taxable. Once again, the court emphasized its "interest in guaranteeing that taxpayers receive fair play from our state's tax enforcement officials." *See also, Amtronix Industries, Ltd.* v.

State of Wisconsin, Labor and Industry Review Comm'n, 115 Wis.2d 108, 339 N.W.2d 802, 806 (Wis. Ct. App. 1983) (court invalidated retroactive assessment of unemployment taxes, noting that company was "trapped," because it could not now change the employment relationship it held in prior years with its subcontractors).

The Supreme Court of Arkansas refused to allow a retroactive assessment of unemployment insurance contributions in *Foote's Dixie Dandy, Inc.* v. *McHenry*, 270 Ark. 816, 607 S.W.2d 323, 327 (1980), again on the basis of fairness. In discussing this issue, the court quoted this Court's statement in *Rock Island, A. & L. R. Co.* v. *United States*, 254 U.S. 141, 143 (1920) that "[m]en must turn square corners when they deal with the government," and its "logical corollary" that "the government [should be] held to a like standard of rectangular rectitude when dealing with its citizens." 607 S.W.2d at 307, *quoting*, Mcquire and Limet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 Harv. L. Rev. 1281, 1299 (1935). *See also, Blocker Drilling Canada, Ltd.* v. *Conrad*, 354 N.W.2d 912, 922 (N.D. 1984) (Supreme Court of North Dakota invalidated reassessment on the grounds of "manifest injustice to the taxpayers").

Similarly, courts in New Hampshire, Minnesota, Ohio, Florida, California and Illinois have refused to allow retroactive assessments of taxes. Generally, these cases involve companies, like Airwork, that had insufficient notice of the tax or reasonably relied on official statements exempting them from liability. *See, e.g., Appeal of Denman*, 120 N.H. 568, 419 A.2d 1084, 1088 (N.H. 1980) ("a reasonable reading of the regulations" would not have indicated that sales taxes should be collected); *Mesaba Aviation Division* v. *County of Itasca*, 258 N.W.2d 877, 880-81 (Minn. 1977) (if a specific representation is authoritatively made and invites reliance, and taxpayer's change of position makes it inequitable to retract the representation, the government may be prevented from

imposing retroactive assessment); *Ormet Corp.* v. *Lindley*, 69 Ohio St. 2d 263, 431 N.E.2d 686, 689 (1982) (court invalidated retroactive assessment of sales and use tax on company's machinery, noting long-established administrative practice of considering the plant exempt). Other state courts have applied similar analyses. *See George W. Davis & Sons, Inc.* v. *Askew*, 343 So.2d 1329, 1332 (Fla. App. 1977); *Market Street Ry. Co.* v. *California State Board of Equalization*, 290 P.2d 20, 30 (Cal. Ct. App. 1955); *Illinois Bell Telephone Co.* v. *Allphin*, 95 Ill. App. 3d 115, 419 N.E.2d 1188, 1196-97 (Ill. App. 1981), *affirmed*, 443 N.E.2d 580 (Ill. 1982).

The overwhelming weight of authority thus precludes a retroactive assessment such as the one imposed on Airwork. The decision of the New Jersey Supreme Court conflicts with the holdings of courts on every level, including this Court. Accordingly, it is imperative that this Court review the decision and eliminate this conflict.

CONCLUSION

In order to protect Airwork's constitutional rights and resolve the conflict among the lower courts, the Chamber respectfully urges this Court to grant the Petition For a Writ of Certiorari.

Respectfully submitted,

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No. 84-1506

In the

Supreme Court of the United States

October Term, 1984

AIRWORK SERVICE DIVISION,

Petitioner,

vs.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The American Civil Liberties Union of New Jersey ("ACLU of New Jersey"), respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae.* The written consent of the attorney for the petitioner herein has been obtained, but the attorney for the respondent herein has refused to consent to the filing of a brief by the ACLU of New Jersey as *amicus curiae.*

The interest of the ACLU of New Jersey is discussed in the accompanying brief. The brief of the petitioner herein

in the New Jersey Supreme Court and its petition for a writ of certiorari do not adequately address the federal constitutional substantive due process issue that is of primary concern to the ACLU of New Jersey. The ACLU of New Jersey does not believe that the argument on this point will be expanded and be made complete in this Court unless leave is granted to the ACLU of New Jersey to participate. If the ACLU of New Jersey's argument is accepted by this Court, the decision of the New Jersey Supreme Court must be reversed.

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BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY IN SUPPORT OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of New Jersey ("ACLU of New Jersey") participated below before the New Jersey Supreme Court as an *amicus curiae,* having obtained leave of that court to do so. Although the four member majority purported not to pass on the merits of the ACLU of New Jersey's position, *Airwork Service Division v. Director, Division of Taxation,* 97 N.J. 290, 302, 478 A.2d 729 (1984), the vigorous dissent of Justice Garibaldi, joined by two other members of the court, relied heavily on the position espoused by the ACLU of New Jersey and by the other *amicus curiae,* Consumer Bureau. 97 N.J. at 302-303, 310-312. For the same reasons that prompted the ACLU of New Jersey to participate as an *amicus curiae* below, it urges this Court to grant Airwork's petition for a writ of certiorari.

The ACLU of New Jersey has a special interest and expertise with respect to the constitutional issues which the petition for a writ of certiorari requests this Court to address. The American Civil Liberties Union, of which the ACLU of New Jersey is an affiliate, is an organization founded over sixty years ago and dedicated to the protection of the liberties guaranteed by the United States Constitution. One of the central, though sometimes elusive, liberties is that embodied in the concepts of procedural and substantive due process. In its most fundamental sense, due process provides a crucial check on the power of the government over the interests and rights of its citizens. Government must, consistent with the precepts of substantive due process, deal with its citizens in a fundamentally fair manner. The right to fundamental fairness applies with equal force to all citizens, whether students, the poor, minorities, or corporate

entities. The ACLU of New Jersey is not particularly concerned with the economic interests of Airwork. It is, however, vitally concerned that the harsh, unjust and fundamentally unfair manner in which the New Jersey taxing authorities have dealt with Airwork, now with the approval of New Jersey's highest court, sets a dangerous precedent that threatens the rights of all citizens.

REASONS FOR GRANTING THE WRIT

The petition of Airwork adequately presents the facts and the proceedings below. Simply stated, Airwork, in reliance on a 1966 Official News Release of the Sales Tax Bureau of the New Jersey Division of Taxation and on July and August 1967 audits of its books and records, did not collect the New Jersey sales tax on repair services it performed on aircraft engines for out-of-state customers where delivery of the serviced engines was made outside New Jersey. *See* 97 N.J. at 304-305 (Garibaldi, J., dissenting). In 1973, despite the position set forth in the 1966 News Release, the Division assessed Airwork back to August 1971[1] for sales taxes on engines delivered out-of-state which Airwork had not collected from its customers. The issue raised by the facts below can be succinctly framed: In light of the nature of the New Jersey sales tax, the prior positions taken by the state taxing authorities, and Airwork's understandable reliance on those positions, does the imposition on Airwork of primary

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1. The Division chose August, 1971, because that was the date of the Division of Tax Appeals' unreported decision in *Fisher-Stevens, Inc. v. Director, Division of Taxation*, Docket S.T. 109 (1971), aff'd, 121 N.J. Super. 513 (App. Div. 1972), certif. denied, 62 N.J. 575 (1973). As Justice Garibaldi observed in her dissent, the *Fisher-Stevens* decision did not even come close to addressing the application of the sales tax to the services at issue in this case, nor should Airwork have been expected to be aware of the unreported agency decision. 97 N.J. at 307-308 (Garibaldi, J., dissenting).

liability for taxes it can no longer collect from its customers[2] produce a result so harsh and unfair as to violate substantive due process. As the vigorous dissent below concluded, "the retroactive imposition of the sales tax [on Airwork] produces such a harsh result that it offends fundamental concepts of fairness relating to agency conduct." 97 N.J. at 303 (Garibaldi, J., dissenting). The ACLU of New Jersey urges this Court to issue a writ of certiorari to review this question.

Constitutional due process imposes certain limits on the retroactive application of taxing schemes. As stated in *Welch v. Henry*, 305 U.S. 134, 147 (1938):

> In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

In the instant case it was not Congress or a state legislature that chose to enact a retroactive tax measure. Rather, the state taxing agency, under the guise of correcting its earlier announced position, effectively applied the sales tax in a retroac-

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2. In none of the lower courts' decisions is it suggested that Airwork could seek to recover the sales tax from the customers from which it did not collect the tax. In fact, in her dissenting opinion, Justice Garibaldi made note of "Airwork's current inability to collect the sales taxes. . ." from its prior customers. 97 N.J. at 303. In relevant part, the sales tax statute requires that the vendor collect the tax from the customer "when collecting the price [or] service charge. . . to which it applies." N.J. Stat. Ann. §54:32B-12(a) (West 1984 Supp.). Although N.J. Stat. Ann. §54:32B-14(a) (West 1984 Supp.) appears to confer upon the vendor the ability to sue a customer for unpaid taxes as though they were part of the purchase price, the statute is unclear how that right is affected if the purchase price has already been collected. Even if Airwork could, theoretically, sue each of its prior customers, the burden of doing so would have been unfairly imposed by the Division's retroactive application of the sales tax to Airwork's repair services on out-of-state engines.

tive manner so as to force Airwork, as a "tax collector" to pay the tax it could no longer collect from its customers.[3]

That this retroactive application is so fundamentally unfair as to violate due process becomes evident upon an examination of the harsh and oppressive results under the taxing scheme at issue. The New Jersey sales tax is premised on the notion that a portion of the cost of government should be borne by the retail purchasers of certain goods and services. Consistent with that premise, the tax is imposed on the customer, not on the vendor. N.J. Stat. Ann. §54:32B-12 (West 1984 Supp.). Secondary liability is imposed on the vendor, N.J. Stat. Ann. §54:32B-14 (West 1984 Supp.), but simply as an inducement to properly collect and turn over to the state the sales tax.[4] The effect of the Division of Taxation's retroactive application of its announced change in policy was to allow the consumer to escape the tax, while imposing it instead on Airwork, the vendor. As such, retroactive application changed the very nature of the tax from a sales tax to be paid by the customer to a business tax to be paid by the vendor for the privilege of selling retail goods and services. The vendor in Airwork's position could

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3. Where Congress or a state legislature would be prevented by principles of due process from applying a tax retroactively, surely a state agency cannot, under the argument that it is immune from principles of estoppel, achieve that very result by changing its prior position. Even less deference should be accorded an agency's retroactive decisions than might be given to a legislature's objectives in imposing retroactivity. *See* Berger, *Retroactive Administrative Decisions*, 115 U. Pa. L. Rev. 371, 375 (1967).

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4. That the customer is the target of the tax and the vendor the collecting agent is demonstrated throughout the statute. *See, e.g.*, N.J. Stat. Ann. §54:32B-2(w) (West 1984 Supp.) (vendors are "persons required to collect the tax"); N.J. Stat. Ann. §54:32B-12(a) (West 1984 Supp.) (vendors are to "collect the tax from the customer," the "tax shall be paid [by the customer] to the [vendor] as trustee for and on account of the State"); N.J. Stat. Ann. §54:32B-20(a)(West 1984 Supp.) (vendor may obtain a refund from the state only if he demonstrates that he has refunded the tax to the customer).

no longer collect the tax from the customer because the Division's retroactive application *first* imposed the tax on Airwork's out-of-state transactions *after* those transactions had occurred.

The transformation of Airwork from the role of a tax collector to that of a primary taxpayer could easily have been avoided had the taxing authority provided adequate notice of its new position. This fact underscores the unfairness inherent in the Division's actions in this case. By upholding the Division's actions, the New Jersey Supreme Court has essentially ruled that an agency of government is free to change its official, published policy and apply that change retroactively, even though affected citizens will suffer irreparable detriment by having relied on the agency's original instructions, and even though such harm could have been avoided merely by the agency having given adequate notice.

What distinguishes this case from cases like *Welch, supra,* 305 U.S. 134, and what renders retroactive application of the sales tax so fundamentally unfair is the otherwise secondary nature of the vendor's liability. The question of retroactive application of taxes so as to transform secondary liability into primary liability arises most often, if not exclusively, in connection with policy changes of a taxing agency, as in the instant case. The majority and the concurring opinions in *Central Illinois Public Service Co. v. United States,* 435 U.S. 21 (1978), addressed this very problem. In *Central Illinois Public Service,* the Internal Revenue Service had attempted to assess retroactively an employer who failed to withhold taxes from those portions of its employees' wages which represented reimbursement for meals. This Court, in its majority opinion, concluded that the regulation was beyond the scope of the tax statute. 435 U.S. at 31-33. Thus, it did not have to reach the question of whether retroactive application of the regulation would be so unfair as to constitute an abuse of discretion or a violation of due proc-

ess. Nevertheless, the Court was clearly concerned that persons who would normally only be *secondarily* liable under the taxing scheme, would, through retroactive rulings, become *primarily* liable for what should have been someone else's taxes. After noting that the regulations extant during the relevant period could hardly be considered to have put employers on notice of their potential liability, the Court concluded:

> An imposition of withholding responsibility on the Company for the lunch reimbursements as far back as 1963 strikes us as somewhat retroactive in character and almost punitive in light of the facts of this case. [435 U.S. at 33, n. 12]

Justice Brennan, joined by the Chief Justice Burger and Justice Powell, wrote a concurring opinion "to state more fully my views on why petitioner cannot be subjected *retroactively* to withholding tax on the theory — whether correct or not — espoused here by the Government." 435 U.S. at 33 (emphasis in original). Justice Brennan went on to observe:

> Those who administer the Internal Revenue Code unquestionably have broad authority to make tax rulings and regulations retroactive. . . . That authority is not unfettered, however, and conditions are present here that would make retroactive application of the withholding tax to petitioner's lunch payment an abuse of discretion. [435 U.S. at 33-34 (citations omitted)]

In the instant case, the Division of Taxation's retroactive application of its changed position so far exceeded the proper exercise of discretion as to constitute a violation of fundamental fairness.

Several state courts have recognized the harshness and oppression that result when a taxing agency retroactively applies policy changes under taxing schemes intended to impose only

secondary liability on the collecting agent. *See Peoria Hotel Co. v. Illinois Dept. of Revenue,* 408 N.E. 2d 1182, 87 Ill. App. 3d 176, 42 Ill. Dec. 473 (App. Ct. 1980); *Pressed Steel Car Co. v. Lyons,* 7 Ill. 2d 95, 129 N.E. 2d 765 (1955); *Hercules Powder Co. v. State Bd. of Equalization,* 66 Wyo. 263, 208 P.2d 1096, rehearing, 66 Wyo. 309, 210 P.2d 824 (1948); *La Societe Française de Bienfaisance Mutuelle v. California Employment Commission,* 56 Cal. App. 2d 534, 133 P.2d 47 (Ct. App. 1943). Although sometimes subsumed under the concepts of abuse of discretion or estoppel, the ACLU of New Jersey submits that these cases, as does the instant case, implicate the substantive due process principle that the government cannot deal with its citizens in a manner that is fundamentally unfair.

JURISDICTION

As noted in Airwork's petition, the majority of the New Jersey Supreme Court never explicitly addressed the issue of retroactivity in terms of constitutional due process. Petition at 12 n.8. *See* 97 N.J. at 302. Despite that fact, this Court can and should determine that it has jurisdiction under 28 U.S.C. §1257(3) to issue a writ of certiorari.

In this case, the first requirement of the "pressed and passed upon" test of jurisdiction has clearly been satisfied. *See, e.g., Webb v. Webb,* 451 U.S. 493 (1981). The federal constitutional question upon which the ACLU of New Jersey urges this Court to issue the writ was adequately and fully presented in the state courts. As the New Jersey Supreme Court specifically noted, "*Amicus* American Civil Liberties Union of New Jersey argues that the retroactive imposition of the sales tax violates plaintiff's constitutional right to substantive due process under both federal and State constitutions." 97 N.J. at 302, n.1. Having

recognized that the federal constitutional issues had been raised before it, the majority purported not to address those issues for the following reasons:

> These issues were not determined by the courts below. We note these issues, but in the absence of their consideration by the lower courts, and without a sound and complete record to demonstrate their validity, decline to address them. [97 N.J. at 302]

The jurisdictional question posed by the New Jersey Supreme Court's characterization of its basis for not reaching the constitutional due process issue is that addressed by this Court in cases such as *Hathorn v. Lovorn*, 457 U.S. 255, rehearing denied, 458 U.S. 1131 (1982), *Michigan v. Tyler*, 436 U.S. 499 (1978), and *Wainwright v. Sykes*, 433 U.S. 72, rehearing denied, 434 U.S. 880 (1977). As stated in *Hathorn*, 457 U.S. at 262, a state court ruling that a federal issue will not be considered because it was not raised in a manner that complies with state court's procedural rules *may* constitute an independent and adequate state ground barring this Court's review.

That the purported failure to comply with a procedural rule may defeat jurisdiction does not mean that it necessarily will. As reiterated in *Michigan v. Long*, 103 S. Ct. 3469, 3474, ____ U.S. ____ (1983), it is incumbent upon this Court to ascertain for itself whether the asserted non-federal ground independently and adequately supports the state court judgment. Accordingly, it is appropriate for this Court to examine the New Jersey Supreme Court's announced rationale for not passing on the constitutional issue. In particular, in examining the New Jersey court's action, this Court should be mindful that an alleged procedural defect in failing to raise a federal constitutional question will not be considered an adequate state ground unless the procedural rule "is strictly or regularly followed." *Barr v. City of Columbia*, 378 U.S. 146 (1964). *See Hathorn, supra*, 457 U.S. 255. The ACLU of New Jersey respectfully submits

that the procedural rule upon which the New Jersey Supreme Court apparently relied does not meet this standard.

A serious obstacle to evaluating the New Jersey court's decision against the "strictly or regularly followed" standard is that the court failed to identify with any particularity the procedural rule or precedent upon which it was relying when it refused to address the substantive due process issue. Presumably, the New Jersey Supreme Court was alluding to the "not raised below" rule, stated in *Deerfield Estates, Inc. v. Township of East Brunswick,* 60 N.J 115, 120, 286 A.2d 498 (1972):

> [T]he general rule of appellate practice, that ordinarily no issue will be considered by the reviewing court unless raised and argued below, is true of a constitutional issue, unless it goes to the question of jurisdiction or presents a matter of real public importance. Where both these characteristics are lacking, review will normally be denied.

Not only has the New Jersey Supreme Court not "strictly or regularly followed" this alleged procedural rule, the rule's formulation has almost as many variations as the cases in which it is cited. More often than not, those formulations include additional factors which would dictate addressing the constitutional issue in this case. Four examples will demonstrate the inadequacies of the New Jersey courts' formulation and application of the "not raised below" rule.

The manner in which the rule was applied in *The Presbyterian Home v. Division of Tax Appeals,* 55 N.J. 275, 288, 261 A.2d 143 (1970) is particularly disturbing. The petitioner in that case asserted an equal protection issue before the New Jersey Supreme Court. After first noting that the petitioner had not raised this constitutional issue in either the Division of Tax Appeals or the Appellate Division, the court stated that it "may, but need not, accept a constitutional question not raised" be-

low. 55 N.J. at 289. Having stated what can hardly be described as a "strict" rule, the court concluded, "In any event, we find no merit in petitioner's claim." 55 N.J. at 289. Despite never even suggesting that the claim was of public importance, the court addressed the merits of the issue, finding it to have no merit. Surely the jurisdiction of this Court cannot rise or fall on a supposed procedural rule under which the New Jersey Supreme Court will exercise its discretion in favor of considering an "untimely" constitutional issue only when the issue has no merit.

A strikingly different variation of the "not raised below" rule was announced in *Krieger v. Jersey City*, 27 N.J. 535, 544, 143 A.2d 564 (1958):

> We have heretofore expressed our willingness to accept issues first advanced on appeal where the expenditure of public funds is involved. *Howard v. Mayor and Board of Finance of City of Paterson*, 6 N.J. 373, 376 (1951).

The instant case involves a significant amount of public funds — over $600,000 in sales taxes allegedly due from Airwork. The fact that considering a constitutional issue may result in a loss of public funds rather than, as in *Howard v. Mayor and Board of Finance of City of Paterson*, 6 N.J. 373, 78 A.2d 709 (1951), a conservation of such funds, should not provide the basis for refusing to consider the issue.

In *In re appeal of Howard D. Johnson Co.*, 36 N.J. 433, 177 A.2d 545 (1962), Justice Weintraub, in dealing with a non-constitutional issue not raised below, stated that the New Jersey courts embrace "the philosophy that justice is the common burden of both counsel and the court and hence a manifestly unjust result shall not be ordered because of the oversight of the advocate." In entertaining the issue in that case, the court never even suggested that the issue was one of significant pub-

lic importance. 36 N.J. at 443. The oversight of Airwork's counsel in not raising the constitutional issues before the lower courts — issues of significant public importance — would not have resulted in the New Jersey Supreme Court refusing to address the issues, had the court applied the rule as formulated in *Howard D. Johnson Co.*

A final example of where the New Jersey Supreme Court relaxed its "not argued below" rule is provided by *Kelley v. Curtiss,* 16 N.J. 265, 108 A.2d 431 (1954). In that case, as here, the issue that had not been raised before the lower courts was fully briefed before the state supreme court on its merits. 16 N.J. at 270. The court concluded that, "in accord with the philosophy of our present procedural framework to avoid unnecessary expense and waste of time consistent with the furtherance of the fair administration of justice, we ought not hestitate to adjudge the question if the matter is ripe for our determination." 16 N.J. at 270.[5]

Had this pronouncement of the "not raised below" rule been applied by the New Jersey Supreme Court in the instant case, it is difficult to conclude that the constitutional due process issue would not have been considered. In avoiding the constitutional issue, the court intimated that the issue might be resolved in some subsequent proceedings "before an appropriate tribunal. . . ." 97 N.J. at 302. To require Airwork to bring this issue before a different tribunal when the issue had been fully briefed before the New Jersey Supreme Court hardly "avoid[s] unnecessary expense and waste of time. . . ." Moreo-

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5. New Jersey Court Rule 1:1-2 provides:

The [court] rules. . .shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice. In the absence of rule, the court may proceed in any manner compatible with these purposes.

ver, it is difficult to image to what tribunal the court was referring, as 28 U.S.C. §1341 would appear to prevent Airwork from pursuing its constitutional claims in a federal forum, other than through the writ which it now seeks.

Numerous other cases have included in the "not raised below" rule additional factors which, had the court considered them, would have been found to have been satisfied here. *See Planned Parenthood of New York City v. State,* 75 N.J. 49, 55, 379 A. 2d 841 (1977); *Berkowitz v. Berkowitz,* 55 N.J. 564, 569, 264 A.2d 49 (1970); *Farley v. $168,400.97,* 55 N.J. 31, 46, 259 A.2d 201 (1969); *Meeker v. Meeker,* 52 N.J. 59, 243 A.2d 801 (1968); *Hayden v. Curley,* 34 N.J. 420, 428, 169 A.2d 809 (1961); *Oliver v. Russo,* 29 N.J. 418, 420, 149 A. 2d 213 (1959); *Devlin v. Surgent,* 18 N.J. 148, 113 A.2d 9 (1955). In several of these cases, the court noted that the issue had not been fully briefed. By contrast, in the instant case, the due process issue was raised by the ACLU of New Jersey in support of Airwork's petition to the New Jersey Supreme Court, and, when the ACLU of New Jersey filed an *amicus curiae* brief, the Division of Taxation responded on the merits of the issue.

In several of its variations, the "not raised below" rule provides for an exception where a question first raised before the appellate court involves public policy concerns that impact beyond the specific interests of the parties. *See, e.g., A. & B. Auto Stores of Jones St., Inc. v. Newark,* 59 N.J. 5, 20, 279 A.2d 693 (1971) (a nonconstitutional claim, not raised below, was of sufficient public interest to justify the court addressing the issue); *American National Red Cross v. Lester,* 129 N.J. Eq. 28, 30, 18 A.2d 295 (E&A 1940). The New Jersey Supreme Court's refusal to apply this exception is inconsistent with the fact that the court granted the ACLU of New Jersey leave to appear as an *amicus curiae* and to address the due process question. The New Jersey court rules specifically provide that, in granting leave to appear as *amicus curiae* the court be satis-

fied that "the applicant's participation will assist in the resolution of an issue of *public importance* . . . ." New Jersey Court Rules 1:13-9 (emphasis supplied). Having invited the ACLU of New Jersey to participate in the resolution of an issue of public importance, it was disingenuous for the court to have refused to invoke its own "issue of public importance" exception to the "not raised below" rule.[6]

For these reasons, this Court should decide that the "not raised below" rule relied on by the New Jersey Supreme Court does not provide an adequate state ground for its decision not to address the substantive due process issue. Accordingly, this Court should conclude that it has jurisdiction.

A conclusion that this Court has jurisdiction will not offend the concerns that have prompted the Court to adopt the "not pressed or passed upon" rule. *See Illinois v. Gates,* 103 S.Ct. 2317, 2323-2324, ____ U.S. ____ (1983); *Webb, supra,* 451 U.S. 493. Because the constitutional issue was thoroughly briefed below, "the state court[] [has been] afforded the opportunity to perform [its] duty, which includes responding to attacks on state authority based on the federal law. . . ." *Webb,* 451 U.S. at 499.

With respect to the concern that "the parties [have] the opportunity to develop the record necessary for adjudicating the issue," *Webb,* 451 U.S. at 500, the record below permitted the New Jersey Supreme Court to dispose of the estoppel issue, which involved essentially the same factual questions as does the substantive due process issue. Despite the majority's

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6. The court's characterization of the issue as not having been raised below is suspect. 97 N.J. at 302. The Court's granting to the ACLU of New Jersey leave to appear on the due process issue was based on a necessary conclusion that this issue already was part of the litigation. In New Jersey, an *amicus* is not a party to an action but merely seeks to advise and assist the court on an issue already part of the litigation. *See Bethlehem Bd. of Education v. Bethlehem Education Association,* 177 N.J. Super. 479, 490, 427 A.2d 80 (App. Div. 1981).

professed concern regarding a "sound and complete record," 97 N.J. at 302, Justice Garibaldi's dissenting opinion persuasively established the sufficiency of the record to deal with the substantive due process issue. In particular, Justice Garibaldi found the record sufficient to establish the following:

> In reliance on the Release, Airwork, which is principally engaged in the business of repairing aircraft engines, did not collect sales tax from its out-of-state customers. It did collect sales tax from its New Jersey customers. From Airwork's point of view, a 1967 tax audit confirmed the viability of this position. During its 1967 audit of Airwork, the Division concluded that Airwork's policy of not collecting sales tax from its out-of-state customers was correct.
> [97 N.J. at 305 (Garibaldi, J., dissenting)]

As the substantive due process issue does not involve a disputed construction of the sales tax statute, this Court's concern that a state court be provided with the opportunity to construe its statutes so as to avoid or obviate Federal constitutional challenges has no application. *Webb,* 451 U.S. at 500. The only issue of construction relevant to the substantive due process issue was uncontroverted — *viz.*, that the New Jersey sales tax is a tax on purchases, not on the right of the vendor to do business; accordingly, the vendor is, in the first instance, a tax collector, not a taxpayer.

In the instant case, the only "independent and adequate state grounds that would pretermit the federal issues" which the state court could have "identified and acted upon in an authoritative manner," *Webb,* 451 U.S. at 500, is the alleged "not raised below" procedural defect. For the reasons already discussed, this Court should conclude that this purported procedural defect is inadequate to deny this Court jurisdiction.

Finally, the decision below is set forth in an opinion which prompted a vigorous dissent. Together, these two opinions permit this Court to evaluate the importance of giving plenary consideration to this case. *Webb,* 451 U.S. at 500-501.

For the reasons set forth above, this Court should conclude that the New Jersey Supreme Court's refusal to address the federal constitutional substantive due process issue does not provide an adequate basis for barring this Court's jurisdiction.

CONCLUSION

The application of the New Jersey sales tax to repair work performed by Airwork on out-of-state engines prior to the state's announced change in its position regarding the taxability of such work is fundamentally unfair. A state, whether acting through its legislature or through an administrative agency, must adhere to principles of fundamental fairness if government is to retain its legitimacy. To permit the New Jersey Supreme Court's decision to stand will erode the due process rights of all citizens.

The ACLU of New Jersey respectfully requests this Court to issue a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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October Term, 1984

AIRWORK SERVICE DIVISION,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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COUNTERSTATEMENT OF THE CASE

Petitioner, Airwork Service Division ("Airwork"), is seeking, by writ of *certiorari*, to have this Court review a decision by the Supreme Court of New Jersey sustaining an assessment imposed under the New Jersey Sales and Use Tax, *N.J.S.A.* 54:32B-1 *et seq.*, by the respondent, New Jersey Director of the Division of Taxation ("Director"). Airwork maintains that the decision sustained an unpublished change in the Director's policy which was retroactively applied against Airwork in violation of the Due Process Clause of the Fourteenth Amendment. This issue was not addressed by the Supreme Court of New Jersey because it was never raised below by Airwork and was raised for the first time before the Supreme Court of New Jersey by an *amicus curiae*, the American Civil Liberties Union.

Airwork is in the business of repairing plane engines for customers. Airwork conducted its repairing services solely in New Jersey for customers located throughout the country. At issue is the taxability of those receipts derived from repairing services performed on plane engines destined for delivery to out-of-state customers following the performance in New Jersey of the taxable services for the period August 12, 1971 to June 30, 1973. Airwork challenged the assessment before the Tax Court of New Jersey maintaining that the repairing services, performed on goods destined for out-of-state delivery, were not taxable under the literal language of the Sales Tax, that the assessment violated the Commerce Clause of the United States Constitution by burdening interstate commerce, that the assessment violated the Equal Protection Clause on the basis that the performance of

services in this state on goods destined for out-of-state delivery should be treated similarly to the sale of goods across state lines, that the assessment violated the Due Process Clause because New Jersey had insufficient nexus with the transaction to warrant the assessment and that the policy underlying the assessment should have been reflected in a regulation adopted pursuant to the New Jersey Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.*, as a condition for imposing the assessment.

The Tax Court heard this matter on crossmotions for summary judgment and upheld the assessment in a written decision dated March 27, 1981. *Airwork Service Division v. Director, Division of Taxation*, 2 *N.J. Tax* 329 (Tax Ct. 1981) (Supp. App. 3a). Airwork appealed the judgment to the New Jersey Superior Court, Appellate Division, which affirmed the trial court's holding. 4 *N.J. Tax* 532 (App. Div. 1982) (Supp. App. 21a). The Supreme Court of New Jersey granted Airwork's petition for certification and, in a decision dated July 23, 1984 (97 *N.J.* 290, 478 *A.*2d 729 (1984)) (App. 1a), held as follows:

> 1. As a matter of state law, the repairing services performed on plane engines in New Jersey are taxable services under the Sales Tax, notwithstanding that the engines were delivered to out-of-state customers following the performance of the services.
>
> 2. As a matter of state law, the Director was not equitably estopped from imposing the assessment merely because the taxes on such transactions were not imposed for earlier tax years.
>
> 3. As a matter of state law, the Director was not required to publish a regulation in accordance with the New Jersey Administrative Procedure Act, *N.J. S.A.* 52:14B-1 *et seq.* as a prerequisite to imposing

the assessment since the statutory standard clearly reflected the taxability of the repairing services.

4. As a matter of state law, the constitutional issue alleging a retroactive application of the sales tax in violation of the Due Process Clause was not properly before the Court since it was never raised by Airwork but rather was briefed for the first time by an *amicus* before the New Jersey Supreme Court.

Although Airwork contends that the assessment imposed against it was contrary to the official policy of the Division of Taxation as reflected in the Commerce Clearing House New Jersey State Tax publication ("CCH") and was thus retroactively imposed, there is no basis for that factual finding in the record. The affidavit of Vincent A. Carretta, who was the superintendent of audit and was responsible for coordinating the audit activities of the Division of Taxation, states that the Airwork assessment,

> . . . was imposed in accordance with the policy of the Division of Taxation of subjecting to the tax all taxable services performed within this State notwithstanding that the items serviced were delivered out of the State after the rendition of the taxable service. [Resp. App. *2a].

In addition, the affidavit of John Baldwin, the present Director of the Division of Taxation, similarly states that,

> . . . the policy of the Division of Taxation since the inception of the Sales and Use Tax Act in July of 1966 has been to tax all services subject to the sales tax performed within the State regardless of whether the products upon which such services are performed

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* The designation "Resp. App." refers to the appendix attached to this brief submitted on behalf of the respondent, Director, Division of Taxation.

> are shipped out of the State subsequent to the performance of the taxable service. [Resp. App. 6a par. 9].

Mr. Baldwin consistently reiterated that position in his deposition, noting that the Division's policy was to tax the receipts from all taxable services performed in New Jersey notwithstanding the ultimate destination of the goods serviced. Mr. Baldwin noted that the instructions accompanying the sales tax returns issued in 1966 and thereafter stated that only taxable services performed *outside* of New Jersey were an exempt category, thus inferring that all taxable services performed in New Jersey were taxable (Resp. App. 24a). This instruction form was filed with the Secretary of State and, therefore, had the force and effect of a regulation (Resp. App. 25a). There is no evidence in the record to contradict the assertion that since 1966 the Division of Taxation has consistently taxed all taxable services performed in New Jersey regardless of the destination of the serviced goods.

Mr. Baldwin's affidavit further notes that the Sales Tax Act became effective April 27, 1966 but applied to transactions occurring after July 1, 1966 (Resp. App. 5a). Immediately following the effective date of the act but prior to the first date of its application, the Division of Taxation drafted a proposed official news release containing questions and answers about the act. One proposed question and answer contained in said draft was the following:

> Q. Is the labor charge for repair work done to a boat subject to tax where: (a) The boat docks in a

port outside New Jersey for repairs; (b) In connection with such repairs, parts are transferred from the boat to a repair shop located in New Jersey; (c) Pursuant to a contract, upon completion of the repair work the parts are delivered back to the boat outside New Jersey?

A. No. Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser outside the State for use outside the State are exempt from the sales tax. Under the facts set forth above, the labor charge would not be subject to the sales tax.

The draft of the proposed official news release was modified and the quoted question and answer deleted. The official news release that was published in June 1966, therefore, did not contain the question and answer involving repair services performed on a boat (Resp. App. 5a to Resp. App. 6a). Although the draft of the proposed news release was published by Commerce Clearing House in its New Jersey State Tax Reporter, this draft of the proposed news release containing the noted question and answer was neither officially published by the Division of Taxation nor filed with the New Jersey Secretary of State (Resp. App. 6a).

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ARGUMENT

The Supreme Court Of New Jersey Correctly Declined To Consider The Due Process Claim As A Matter Of State Law Since That Issue Was Never Raised Below By Airwork And Was Alleged For The First Time On Appeal By An Amicus Curiae Before The Supreme Court Of New Jersey.

The New Jersey Sales and Use Tax, *N.J.S.A.* 54:32B-1 *et seq.*, imposed a 5% levy for the assessment period in question on the receipts derived from the sale of tangible personal property and the performance of designated services. *N.J.S.A.* 54:32B-3. The Legislature enumerated as taxable services the ". . . maintaining, servicing, repairing tangible personal property not held for sale in the regular course of business. . . ." *N.J.S.A.* 54:32B-3(b) (2). The applicable statute for the period in question made no distinction between taxable services performed on goods destined for out-of-state delivery or goods remaining in New Jersey and clearly taxed the servicing and repairing functions performed by Airwork in this state regardless of the eventual destination of the repaired aircraft engines.

Airwork maintains that it was a mere collector of the tax, that it properly relied on the information published in CCH in not collecting the tax and that the state is thereby prohibited from assessing an allegedly "retroactive" tax under the Due Process Clause. This issue of "unconstitutional unfairness" was never previously raised by Airwork and was raised for the first time before the Supreme Court of New Jersey by the American Civil Liberties Union, participating as an *amicus curiae*.

The New Jersey Supreme Court declined to address this issue, noting that this issue was raised by the American Civil Liberties Union, was not previously considered by the lower courts and was thus not being presented with a sound and complete record to demonstrate the viability of this allegation (Supp. App. 13a). It is well established as a matter of state law that an *amicus* is not a party to an action but merely seeks to advise and assist the court on an issue already part of the litigation. An *amicus* must thus accept the issues previously raised by the parties and is precluded from injecting new issues not already considered. *Bethlehem Bd. of Education v. Bethlehem Education Association,* 177 *N.J. Super.* 479, 490, 427 *A.*2d 80 (App. Div. 1981); *In re Byram Tp. Bd. of Education,* 152 *N.J. Super.* 12, 18, 377 *A.*2d 745 (App. Div. 1977); *Endress v. Brookdale Community College,* 144 *N.J. Super.* 109, 123, 364 *A.*2d 1080 (App. Div. 1976). Therefore, since Airwork never raised this constitutional issue before any level of the New Jersey courts, the Supreme Court of New Jersey properly declined to address that issue as a matter of state law.

This Court has consistently recognized that federal courts should intervene in the state judicial process only to correct wrongs of a federal constitutional dimension. *Engle v. Isaac,* 457 *U.S.* 1141 (1982). In evaluating issues concerning state law, a federal court must defer to the determinations by the state courts. *Kolender v. Lawson,* 461 *U.S.* 352, 356 (1983). Particularly with regard to the views of the state's highest court concerning issues of state law, such views are binding on the federal courts. *Wainwright v. Goode,* — *U.S.* —, 78 *L.Ed.*2d 187, 192 (1983). The fact that there was a division of opinon

among the members of a state's highest court does not prevent the opinion of the majority from becoming the decision of the court and as such binding and conclusive on the federal courts. *Williams v. Eggleston,* 170 *U.S.* 304, 309 (1897). The decision by the Supreme Court of New Jersey declining to consider the issue of substantive due process in this matter on the basis that said issue was not properly before the Court was a decision of state law which should not now be subject to further review.

This Court's jurisdiction to review this case arises under 28 *U.S.C.* § 1257(3), which concerns federal rights and privileges that have been "specially set up or claimed" and upon which there has been a final decision of the state's highest court. As noted, the claim by Airwork of a substantive due process violation was never raised by it in the state courts and is thus not a proper issue before this Court. As noted in *Cardinale v. Louisiana,* 394 *U.S.* 437, 439 (1969),

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio,* 385 *U.S.* 92, 17 *L.Ed.*2d 189, 87 *S.Ct.* 252 (1966), they should be given the first opportunity to consider them.

See also *Moore v. Illinois,* 408 *U.S.* 776, 799 (1972); *Hill v. California,* 401 *U.S.* 797, 805 (1971). Therefore, the

federal constitutional issue raised in the petition should not be considered and the petition should be dismissed.

However, should this Court deem the challenge to the sales tax assessment on substantive due process grounds to be properly raised, Airwork's assertion is, nevertheless, without merit. Airwork, as the vendor of the taxable repairing service, had the statutory obligation to charge the sales tax to its customers or otherwise be directly liable therefor as a "taxpayer" to the State. *N.J.S.A.* 54:32B-14. The statute clearly provides that a vendor is to presume that "all receipts for property or services of any type mentioned in subsection (a), (b) and (c) of section 3 . . . are subject to tax until the contrary is established. . . ." Airwork, under the alleged reliance upon the question and answer concerning boat repairs appearing in CCH, ignored this standard and failed to collect the sales tax on the repair services. It is clear, however, that the CCH material contained unofficial, outdated and erroneous information. For example, the same CCH publication that contained the question and answer on the boat repairs also contained the following question and answer regarding the taxability of clothing:

> Q. Is clothing taxable?
>
> A. The sale of an item of clothing or footwear is taxable only if the price of the item exceeds $50. . . . [Resp. App. 7a, par. 3].

The original sales tax act, New Jersey Public Law 1966, chapter 30, was enacted on April 27, 1966 and exempted only the first $50 of clothing and footwear purchases. Prior to the July 1, 1966 effective date of the sales tax, the law was amended by New Jersey Public Law 1966,

chapter 51 to totally exempt from the tax the sale of clothing and footwear. CCH continued to publish the news release notwithstanding that it contained clearly outdated and erroneous information. Airwork, therefore, had no basis for reliance upon such suspect and dated information in failing to collect the sales tax relating to its repairing services.

Airwork, as the vendor of taxable repairing services generating substantial receipts, should not have relied on the CCH information and instead should have either collected the sales tax from its customers or requested specific advice from the Division of Taxation as to the taxability of these services. The Division of Taxation, in accordance with *N.J.S.A.* 52:14B-8 of the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.*, would have issued an advisory or declaratory ruling as to the taxability of Airwork's services had it been requested to do so.* In addition, the assessment in question did not predate the decision in *Fisher-Stevens v. Director, Div. of Tax.*, decided by the Division of Tax Appeals on August 12, 1977 (Docket No. S.T. 109), aff'd 121 *N.J. Super.* 513, 298 *A.*2d 77 (App. Div. 1972), certif. den. 62 *N.J.* 575, 303 *A.* 2d 328 (1973). *Fisher-Stevens,* involving the taxability of certain advertising services, unequivocally established

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* In addition, Airwork could have initiated a declaratory judgment action seeking clarification of the taxability of its repairing services. For example, in *Registrar and Transfer Company v. Director, Div. of Tax.*, 166 *N.J. Super.* 75, 398 *A.*2d 1335, (App. Div. 1979), certif. den. 81 *N.J.* 63, 404 *A.*2d 1162 (1979), a vendor of storage services filed a declaratory judgment action seeking a court determination as to whether the storage services were properly taxable under the Sales Tax. The purpose of the suit was to seek certainty as to the taxability of the storage services.

the taxability of such services notwithstanding that they were performed on goods destined for out-of-state delivery.

The label of "unfairness" placed by Airwork on this assessment is grounded in the contention that the assessment reflected a change in policy which was retroactively applied to transactions occurring prior to the change. Airwork cites *Central Illinois Public Service Co. v. United States,* 435 *U.S.* 21 (1978), as purportedly supporting the constitutional impropriety of the assessment. That case concerned whether an employer was liable to the Internal Revenue Service for failing to withhold federal income taxes in 1963 on lunch expense reimbursements made to its employees. The Supreme Court held that the lunch expense reimbursements did not constitute wages for withholding purposes in 1963, the employer was not responsible for withholding any taxes on such reimbursements in 1963 and the employer could not be held responsible in 1971 for such taxes. In reaching its decision, this Court stressed that in 1963 the existing judicial decisions opined that lunch expense reimbursements did not constitute taxable wages.

> Further, in 1963 and for some time thereafter all judicial decisions were the other way, even on the deductibility issue. Only with *Correll,* decided by this Court in 1967, was there a ruling of nondeductibility. And until the Court of Appeals' decision in the present case, no court had ever held lunch reimbursements to be wages for withholding purposes. [435 *U.S.* at 32].

Based on the judicial climate in 1963, this Court quite properly found that the employer had no basis for with-

holding taxes on the employees' reimbursed lunch expenses.

The holding in *Central Illinois* does not support the claim that Airwork was being retroactively subjected to the sales tax. In August of 1971, *Fisher-Stevens* left no doubt as to the taxability of Airwork's services. The record in this case does not reflect any retroactive application of the sales tax upon services. The Director of Taxation has consistently imposed the sales tax upon all taxable services performed in this State, regardless of the destination of the serviced goods. Since no contrary evidence appears in the record, Airwork has no basis for asserting that the tax in question was retroactively imposed. The Supreme Court of New Jersey made such a finding without implicating any federal constitutional principle. This issue is, therefore, bereft of any appropriate federal constitutional question reviewable by this Court.

However, even if there is a perceived federal constitutional issue involved in this case, this Court has steadfastly sustained the imposition of tax levies clearly warranted under the applicable tax law even in circumstances of retroactive application where the taxpayer may have relied to his detriment on previous administrative policy. *Dixon v. United States,* 381 *U.S.* 68, 73 (1965); *Automobile Club of Michigan v. Commission of Internal Revenue,* 353 *U.S.* 180, 183 (1957). See also *Welch v. Henry,* 305 *U.S.* 134 (1938); *Cooper v. United States,* 280 *U.S.* 409 (1930); *Bruschaber v. Union Pacific R.R. Co.,* 240 *U.S.* 1 (1916). It is clear that the legal contention proposed by Airwork is without merit and certainly does not warrant further review by this Court.

The Sales Tax statute on its face provided no exemption for taxable repairing services performed completely in New Jersey merely because the goods serviced were ultimately destined for out-of-state delivery. The assessment imposed was unequivocally consistent with the statutory standard and thereby, under the clear precedents articulated by this Court, could not be construed to deprive Airwork of due process of law.

In summary, Airwork had no basis to rely on the CCH information in failing to collect the tax, Airwork ignored the clear holding in *Fisher-Stevens* regarding the taxability of services performed in New Jersey, Airwork failed to seek clarification from the Division of Taxation as to the taxability of its repairing services in accordance with the procedures outlined in the Administrative Procedure Act, Airwork ignored the clear language of the Sales Tax that repairing services, without exception, are subject to the tax and Airwork failed to adhere to the presumption of taxability explicitly articulated in the Sales Tax. In addition, there was no regulation or official instruction issued by the Director to Airwork which established the nontaxability of the repairing services, there was no judicial opinion which reflected an inconsistent policy and there was no ambiguity in the statute. As a matter of state law, the Supreme Court of New Jersey sustained the assessment and properly declined to consider the substantive due process issue which was never raised by Airwork in the state courts.

The petition for writ of *certiorari* plainly does not raise a question of constitutional dimension which would warrant the granting of such extraordinary relief. Therefore, the petition should be denied.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Respondent,
Director, Division of Taxation

By: HARRY HAUSHALTER
Deputy Attorney General
Member of the Bar of the
United States Supreme Court

DATED:

JAMES J. CIANCIA
Assistant Attorney General
Of Counsel

HARRY HAUSHALTER
Deputy Attorney General
On The Brief

APPENDIX

AFFIDAVIT OF VINCENT A. CARRETTA

DOCKET NO. S.T. 279-7[illegible]

TAX COURT OF NEW JERSEY

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for Defendant,
Director, Division of Taxation
107 West State Street
Trenton, New Jersey 08625

By: Harry Haushalter
Deputy Attorney General
609/292-1527

AIRWORK SERVICE DIVISION, a division of Pacific Airmotive Corporation, and a subsidiary of Purex Corporation Ltd., a California corporation,

Plaintiff,

vs.

DIRECTOR, DIVISION OF TAXATION,

Defendant

STATE OF NEW JERSEY)
COUNTY OF MERCER) SS.

Civil Action

AFFIDAVIT OF VINCENT A. CARRETTA IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

VINCENT A. CARRETTA, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am employed by the New Jersey Division of Taxation as Superintendent of Audit and am responsible

for supervising audit activity conducted by the Division of Taxation.

2. I am familiar with the assessment imposed upon the plaintiff for repair services under the New Jersey Sales and Use Tax Act, N.J.S.A. 54:32B-1 *et seq.*

3. In a revised final determination letter dated December 17, 1974, the Division of Taxation assessed $628,255.31 in sales taxes plus accrued interest against the plaintiff. Of that amount, $612,999.00 represents sales taxes imposed by the Division of Taxation upon receipts earned by the plaintiff for repair services performed in this State upon plane engines and $15,256.31 represents sales taxes imposed by the Division upon receipts earned by plaintiff for the rental of plane engines to customers.

4. The sales taxes imposed upon the rendering of the repair services were levied pursuant to N.J.S.A. 54:32B-3(b) (2) and involve receipts earned by the plaintiff for a repairing service conducted solely within New Jersey.

5. The assessment in question was imposed in accordance with the policy of the Division of Taxation of subjecting to the tax all taxable services performed within this State notwithstanding that the items serviced were delivered out of state after the rendition of the taxable service.

6. The assessment period in question includes August 12, 1971 to June 30, 1973 and commenced on the date of the decision by the Division of Tax Appeals in *Fisher-*

Stevens v. Director (S.T. 109), aff'd 121 N.J. Super. 513 (App. Div. 1972, certif. den. 62 N.J. 575 (1973)

/s/ Vincent A. Carretta

Sworn to and subscribed
before me this 14th day
of January, 1980.

/s/ Harry Haushalter
Attorney at law of New Jersey

AFFIDAVIT OF JOHN R. BALDWIN

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—MERCER COUNTY

DOCKET NO. C-1571-74

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendant
State House Annex
Trenton, New Jersey 08625

By: Harry Haushalter
Deputy Attorney General
609/292-1527

AIRWORK SERVICE DIVISION, a division of Pacific Airmotive Corporation, a California corporation and a subsidiary of Purex Corporation, Ltd., a California corporation,

Plaintiff,

vs.

DIVISION OF TAXATION,
DEPARTMENT OF THE TREASURY,
STATE OF NEW JERSEY,

Defendant.

STATE OF NEW JERSEY)
) SS.
COUNTY OF MERCER)

Civil Action

AFFIDAVIT OF JOHN R. BALDWIN

JOHN R. BALDWIN, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am presently employed as Assistant Superintendent of Collection and Enforcement in the Division of Taxation, Department of the Treasury, State of New Jersey.

2. I was formerly employed as Assistant State Supervisor of the Sales Tax Bureau of the Division of Taxation prior to the reorganization of the Division of Taxation.

Subsequent to the effective date of the New Jersey Sales and Use Tax Act, N.J.S.A. 54:32B-1 *et seq.* (April 27, 1966) and prior to the first date of applicability of the taxes imposed thereunder (July 1, 1966), I was involved in the promulgation and implementation of policy regarding the administration of said statute, and remained so involved thereafter.

4. Immediately following the effective date of the New Jersey Sales and Use Tax Act, but prior to the first date of applicability of the taxes imposed thereunder, certain representatives of the Division of Taxation drafted a proposed official news release containing questions and answers about the Sales and Use Tax Act. One proposed question and answer contained in said draft was the following:

> Q. Is the labor charge for repair work done to a boat subject to tax where: (a) The boat docks in a port outside New Jersey for repairs; (b) In connection with such repairs, parts are transferred from the boat to a repair shop located in New Jersey; (c) Pursuant to a contract, upon completion of the repair work the parts are delivered back to the boat outside New Jersey?
>
> A. No. Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser out-

side the State for use outside the State are exempt from the sales tax. Under the facts set forth above, the labor charge would not be subject to the sales tax.

5. The draft of the proposed official news release was modified and the specific question and answer appearing in paragraph 4 above was deleted. Attached to this affidavit as Exhibit C is a copy of the official news release that was published in June of 1966.

6. The draft of the proposed news release was published by Commerce Clearing House and presently appears in Volume 1 of the New Jersey State Tax Reporter at pp. 6371-6383. The specific citation noted in paragraph 4 above is cited at p. 6380.

7. Since the proposed draft of the official news release containing the noted question and answer was never officially published, said material was neither officially released for publication to Commerce Clearing House nor was it ever filed with the Office of the New Jersey Secretary of State.

9. To the best of my knowledge, the policy of the Division of Taxation since the inception of the Sales and Use Tax Act in July of 1966 has been to tax all services subject to the sales tax performed within the State regardless of whether the products upon which such services are performed are shipped out of the State subsequent to the performance of the taxable service.

/s/ John R. Baldwin

Sworn to and Subscribed
before me this 28th day
of January, 1975.

/s/

Notary Public of New Jersey
My Commission Expires Jan. 5, 1976

(SEAL)

STATE OF NEW JERSEY
OFFICIAL NEWS RELEASE
Office of the State Treasurer
Statehouse, Trenton, N.J.

Phones: 292-5031, 292-5032 or 292-5119

For Release At Will

WHAT NEW JERSEY'S SALES AND USE TAX MEANS TO YOU . . . THE CONSUMER

1. Q. Must the sales tax be paid on purchases *completely delivered* before July 1, 1966 but partially paid for after July 1, 1966?

   A. No. There is no tax where the goods were completely delivered before July 1, 1966.

2. Q. Is there a tax on the sale of goods *completely paid for* before July 1, 1966, but delivered after July 1, 1966?

   A. No. There is no tax where complete payment is made before July 1, 1966.

3. Q. Is clothing taxable?

   A. The sale of an item of clothing or footwear is taxable only if the price of the item exceeds $50. Accessories such as jewelry, handbags, and umbrellas, however, are taxable, regardless of price.

4. Q. If a sport coat is purchased for $40 and a hat for $15, is there a tax?

   A. No, because the sale price of each item is under $50.

5. Q. If a suit is purchased for $55 and a hat for $15, is there a tax?

   A. The tax is payable on the $55 suit which is considered a single item of clothing. There is no tax

on the sale of the hat because the sale price is under $50.

6. Q. Is the fuel used in heating my residence taxable?

   A. No. Purchase of all fuel is tax exempt.

7. Q. I rent my living quarters. Will the rent I pay to the landlord be taxable?

   A. No. The sales tax is not imposed on the rental of any real property, except hotel or motel rooms occupied for 90 days or less where the charge is more than $2 a day.

8. Q. Is the purchase of a home taxable?

   A. No. The sales tax does not apply to the sale either of new or old real property no matter whether it is residential, business or industrial.

9. Q. Would the purchase of furnishings for a home be taxable?

   A. Yes. Any purchase of tangible personal property is subject to the sales tax, unless specifically exempted.

10. Q. Will the sales tax apply to the materials purchased by contractors and repairmen for use in building homes and other private structures?

    A. Yes. Sales to contractors and repairmen for use by them in erecting private structures for others or improving, altering or repairing real property of others are deemed to be retail sales and therefore taxable.

11. Q. Will groceries, meat, vegetables or dairy products be taxed?

    A. No. Most food for human consumption at home is not taxable. However, candy, confectionary, soft drinks, certain fruit drinks and liquor and wine for off-premises consumption are taxable. Restaurant meals are also taxable.

12. Q. Are admissions to skating rinks, beaches and swimming pools taxable?

A. No. Charges for admission to or the use of facilities for sporting activities where the patron is a participant are not subject to the tax.

13. Q. Would the rental of shoes at a bowling alley, or beach umbrellas at a beach or pool be taxable?

A. Yes. These items are taxable as tangible personal property, notwithstanding their use for participant sports.

14. Q. Are automobile repairs taxable?

A. Yes. The tax is payable both on parts and labor. Most other types of services to automobiles are also subject to tax, such as lubrication, battery charging, towing, washing and waxing.

15. Q. What restaurant meals are taxable?

A. A tax is imposed on restaurant meals and drink, except alcoholic beverages.

16. Q. Are meals taxable to those attending functions of non-profit organizations, such as religious or educational conventions?

A. No. An exemption is provided for meals paid for or sold directly by organizations when these meals are furnished at organization affairs.

17. Q. Are utility bills taxable?

A. No. Consumers; utility services, including telephone and telegraph gas, water, electricity, steam, refrigeration services and fuel are exempt.

18. Q. Would the lease or rental of a car, truck, trailer, boat, garden tools or building tools be taxable?

A. Yes. The rental or lease of any tangible personal property is taxable, unless specifically exempted.

19. Q. Would the purchase of textbooks from a college book store be taxable?

A. No. Textbooks for student use are exempt. However, sales of other items sold in shops or stores operated by charitable, religious, or educational non-profit organizations are subject to tax.

20. Q. If a resident of New Jersey buys a movie camera outside New Jersey and brings it into the State, must he pay a tax?

A. Yes, if the out-of-state vendor does not collect the New Jersey sales tax, the buyer must pay the use tax directly to the New Jersey Sales Tax Bureau. (Where a sales tax has also been paid to another state or locality in that state, inquiry should be made as to whether credit can be claimed for the tax paid the other state or locality in that state.)

21. Q. If a resident of another state bought an automobile in this State, is the sale taxable?

A. No. Sales of motor vehicles to a non-resident who has no permanent place of abode in New Jersey are not subject to the sales tax, even if delivered in this State, provided the motor vehicle will not be used in carrying on any business, employment or profession in this State. Purchases of all other tangible personal property by non-residents are taxable if delivered here, but exempt if delivered outside the State.

22. Q. Will a tax be payable on the purchase of a newspaper, magazine or periodical?

A. No. These purchases are specifically exempt.

23. Q. If a person buys his own textile material and accessories and has a tailor make them into a suit, are the tailor's services subject to tax?

A. Yes. The production of tangible personal property such as a suit is taxable. However, tailoring

which involves the repairing or mending of tangible property is exempt.

24. Q. Is a charge for radio or television repairs subject to tax?

A. Yes. This constitutes a repair to tangible personal property and both the charges for the parts and labor are subject to tax.

25. Q. Are cosmetics and cosmetic supplies taxable?

A. Yes.

26. Q. Is the purchase of medicine or drugs by prescription taxable?

A. No. Prescription drugs and prescription medicines for the cure, relief, treatment or prevention of illness or disease in humans are exempt from the tax. Non-prescription drugs or medicines, such as aspirin, are taxable. Drugs and medicines with or without prescriptions for animals are taxable.

27. Q. Is a sales tax payable on the development of home movies, photographic films and prints?

A. Yes. Services performed on tangible personal property not held for resale are taxable.

28. Q. Is there a tax on "room service" meals charged by a hotel?

A. Yes. The additional charge is considered part of the cost of the meal and, therefore, taxable.

29. Q. Are dietary foods and health supplements subject to the sales tax?

A. No. These items are exempt.

30. Q. Are such things as artificial limbs, dentures and prescription glasses taxable?

A. No. These prosthetic aids are exempt from the tax.

31. Q. Are auto parking lot charges subject to tax?

    A. No.

32. Q. What types of services to tangible personal property are taxable?

    A. In general, the sales tax applies to the cost of installing tangible personal property when it is not incorporated into real property so that it represents a capital improvement. It also applies to maintaining, servicing and repairing tangible personal property not held for resale in the ordinary course of business.

33. Q. If a repair is made to my home, on what must a tax be paid?

    A. The tax is on the total charge, including both labor and materials.

34. Q. Are charges for lawn-mowing and snow removal services subject to the tax?

    A. Services of this kind are not subject to tax unless performed by someone who is in a regular trade or business offering these services to the public.

35. Q. Is a charge by a tree service company for pruning trees subject to tax?

    A. Yes. Servicing real property is taxable.

36. Q. If a home owner has his house painted or his lawn mowed by a person who does this kind of work only occasionally, does he pay a tax on the amount paid?

    A. No. This is a service rendered by a person who is not in a regular trade or business offering his services to the public.

37. Q. In the above illustration, is there a tax on the paint purchased?

    A. Yes. The purchase of the paint represents a retail sale of tangible property.

38. Q. If a home-owner has his grounds cared for by a commercial gardener, are the services taxable?

A. Yes. Services rendered by an individual who is in a regular trade or business offering his services to the public are taxable.

39. Q. Would the installation of a new heating system in a private home be taxable?

A. No. There is no tax *on the cost of installing* property which becomes a capital improvement to real property. However, the tax does apply to the materials used in the installation.

40. Q. Is a charge for removing the stucco exterior of an older house and installing aluminum siding in its place subject to tax?

A. No, since this constitutes a capital improvement to real property rather than a repair. However, the tax does apply to the aluminum siding.

41. Q. If a home-owner has some broken windows replaced by a glazier or bathroom fixtures repaired by a plumber, are these costs taxable?

A. Yes. The tax would apply to the total charge, including both labor and materials.

42. Q. Is the cost of a window-cleaning service taxable?

A. Yes.

43. Q. Is a roofer's charge for replacing shingles, blown off during a windstorm, subject to tax?

A. Yes. This would be taxable as a repair to real property, unless the work was extensive enough to consider it a capital improvement.

44. Q. If a home-owner has a porch added to his home, is the total cost of this improvement taxable?

A. No. This represents a capital improvement and as such only the cost of material is taxable.

45. Q. Is the service provided by a stock broker in the purchase and sale of securities taxable?

A. No. Financial, management and consulting services rendered to an individual are not taxable.

46. Q. Are services rendered by the trust department of a bank in the management of one's estate taxable?

A. No. Personalized management and consultant services are not taxable.

47. Q. Are the charges for landscaping services taxable for both labor and materials?

A. Yes—except where it becomes a capital improvement. When a capital improvement is made, the materials are taxable but no tax is due on the service rendered.

48. Q. Are services rendered by exterminators taxable?

A. Yes. This is one of the taxable services to tangible personal or real property.

49. Q. Are alterations and repairs to wearing apparel subject to tax?

A. Alterations and repairs are exempt, except alterations to new clothing.

50. Q. Are laundry and dry cleaning services subject to tax?

A. No. Laundering and dry cleaning services are exempt.

51. Q. Are laundering and dry cleaning services performed by coin-operated machines taxable?

A. No. Laundry and dry cleaning services are exempt regardless of the method used.

52. Q. Are charges for boarding dogs, cats, or other pets subject to tax?

A. Yes. In addition, other services to pets and animals, such as grooming and clipping, are taxable. So are sales of pet foods, even though bought in a grocery store.

53. Q. Is the storage of personal and household effects subject to tax?

A. Yes. The storage of all tangible personal property not held for sale in the regular course of business is taxable.

54. Q. Are moving and storage charges subject to tax?

A. Storage of tangible personal property is taxable, but moving (transporting) property is not taxable if the transportation cost is separately charged.

55. Q. Is the rental of a safe deposit box taxable?

A. Yes. The rental of a safe deposit box or similar place is taxable.

56. Q. Where the sale of food is not stated separately but is included in a single charge which also covers lodging—as in an American plan hotel—is the total amount taxable?

A. Yes. However, if the purchaser is exempt from the hotel room occupancy tax because he is a permanent resident, the portion of the charge allocable to lodging is not taxed.

57. Q. Are loans received from a finance company taxable?

A. No. Financial services are not taxable.

58. Q. Are premiums paid on insurance policies taxable?

A. No. Insurance premiums and annuity considerations are not taxable.

59. Q. Which organizations are exempt?

A. Exempt organizations include: (a) The United States government and its agencies; (b) The

United Nations or any international organization of which the United States is a member; (c) The State of New Jersey and its agencies and instrumentalities; and (d) Non-profit organizations operated solely for religious, charitable, scientific, literary, educational purposes, for the prevention of cruelty to children or animals, or testing for public safety.

However, if any of these organizations sells goods or services in a shop or store and such goods or services are normally sold commercially, except for textbooks, then the exempt organization must collect the sales tax from its customers.

60. Q. When does the sales tax apply to hotel and motel rooms?

A. The tax applies to transient occupancy if the charge is more than $2 per night.

61. Q. Is there a tax on hotel or motel rooms occupied as a permanent residence?

A. No. If the hotel or motel rooms are occupied for at least 90 consecutive days, there is no tax.

62. Q. The YWCA rents rooms at rates of $3 per day and up. Is the rental income from these rooms taxable?

A. No. Any non-profit charitable, religious or educational organization that operates a hotel, or offers rooms for rent, is not subject to the tax if it carries on its other activities in that building.

63. Q. If the hotel lists separately the charges for room rental and the charges for certain services such as the use of equipment, maid service, towel and linen service, elevator service, etc., how much of the total is subject to tax?

A. The total amount is taxable since charges for furnishings and accommodations accompanying the use of the room constitute rent.

64. Q. Are admissions to stock car races taxable?

A. Yes—if the charge is in excess of 75¢.

65. Q. Are admissions to high school basketball games taxable?

A. No. Admissions to elementary and high school athletic games are exempt if the proceeds go to the school.

66. Q. Are admissions to or charges for use of skiing facilities taxable?

A. No. Charges for admissions to sporting activities in which the patron is a participant are exempt from sales tax. This would include such sports as bowling, swimming, roller skating and ice skating.

67. Q. Are admissions to a dance sponsored by a church taxable?

A. No. Most admissions charged for non-athletic events by non-profit groups are exempt from sales tax.

68. Q. Are admissions to college athletic events taxable?

A. Yes. No exemption is provided for athletic event admissions of non-profit groups except those of elementary and high school groups.

69. Q. Are admissions paid for a ride on a ferris wheel taxable?

A. Yes—if the charge exceeds 75¢

70. Q. Are admission charges in excess of 75¢ to horse races taxable?

A. Yes. Admissions to certain sporting events, such as, horse racing, football and basketball are subject to the sales tax.

71. Q. Are charges for delivery services taxable?

A. No. Charges for transportation of property from the vendor to the consumer are not taxable where the charge is separately stated in the written contract, if any, and any bill rendered to the purchaser.

72. Q. Is there a tax on haircuts and beauty parlor services?

A. No. All services upon the person of an individual are not taxable. This includes, among other services, massage, manicuring and reducing treatments. Materials or supplies purchased in connection with such services usually are taxable.

73. Q. Are the fees charged by an employment agency taxable?

A. No.

(p. 1)

DIVISION OF TAX APPEALS
DEPARTMENT OF THE TREASURY
STATE OF NEW JERSEY

DOCKET NO. S.T. 279-75

AIRWORK SERVICE DIVISION, a Division of Pacific Airmotive Corporation, a California corporation, and a subsidiary of Purex Corporation, Ltd., a California Corporation,

Petitioner,

vs.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

Depcsitions Upon Oral Examination of:

JOHN R. BALDWIN

TRANSCRIPT of the deposition of JOHN R. BALDWIN, witness in the above-entitled matter, called for Oral Examination pursuant to the Rules of Civil Practice and Procedure, Notice to Take Depositions and Stipulation and Agreement entered into by and between counsel for the respective parties, said deposition being taken by and before PATRICIA J. KEARNS, a Notary Public and Certified Shorthand Reporter of the State of New Jersey, at the offices of WHARTON, STEWART & DAVIS, ESQS., 50 West Main Street, Somerville, New

Jersey, on Tuesday, November 1, 1977, commencing at approximately ten o'clock in the forenoon.

(p. 1A) APPEARANCES:

PITNEY, HARDIN & KIPP, ESQS.,

BY: JAMES F. KEEGAN, ESQ., and
GERALD G. NEARY, ESQ.,
Attorneys for the Petitioner.

HARRY HAUSHALTER, ESQ.,
DEPUTY ATTORNEY GENERAL
Attorney for the Respondent.

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WITNESS:		*DIRECT*
JOHN R. BALDWIN,		
By Mr. Keegan		3

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(p. 3) JOHN R. BALDWIN, having been duly sworn according to law by the officer, testified as follows:

DIRECT EXAMINATION

BY MR. KEEGAN:

Q. State your home address for the record.

A. 72 Mountainview Road, West Trenton, New Jersey.

Q. Mr. Baldwin, my name is James Keegan. I am an attorney from Pitney, Hardin and Kipp. We represent Airwork in the pending proceeding before the Division of Taxation Appeals, and we are here to take your deposition today.

Have you ever been deposed?

A. Yes, I have.

Q. Are you familiar with the procedures and the way the deposition is handled?

A. Well—

Q. I'm going to ask you a number of questions. If you don't understand a question, please say so. If you would like me to rephrase it or try to approach it a different way, tell me. Mr. Haushalter might want to interject an objection on the record, so please allow him an opportunity to do that before you answer it.

What is your present position with the Division of Taxation?

* * * * *

(p. 97) happened? A. I don't recall any mention. Often times in a conversation of that nature, somebody might refer to some other matter, you know, that might have been litigated or it might have been a full-blown hearing on it; or there might have been an agent's opinion on it or any number of things. They might refer to another matter. I don't have any recollection of anybody raising another specific case and, you know—

Q. Do you know if the Division has ever published to the public a statement of the policy referred to in paragraph nine of your affidavit?

A. Not in specific terms, no. At least I don't know of any, okay? I think, inferentially, that implies that policy.

For example, we refer to services performed outside of New Jersey as a category of exempt gross receipts. We do this in our instructions for the preparation of the return. Now, inferentially, I think, you could draw a conclusion that we are saying that services which the tax is imposed upon—we begin with "When performed in New Jersey,"—are subject to tax regardless of where the property on which the services are performed or delivered. Now, granted, that every citizen might not be able to draw that inference, but certainly it would be enough to raise a question in the mind of somebody (p. 98) who was preparing that return.

Q. Now, if I understand your testimony, you are saying if someone reviewed the Division's statements of policy concerning the taxability, sales taxability of services performed outside the State of New Jersey would

draw the conclusion, inferentially, that service performed in the State of New Jersey were taxable is that correct?

A. I certainly read it that way or at least there would be enough of a doubt raised to specifically pursue the question.

Q. Where would they find those publications concerning the services?

A. They get one in the mail every three months.

Q. Concerning the taxability of services performed outside the State of New Jersey?

A. I think I testified this morning that that appears in the instructions for the completion of the sales tax return.

Q. Are there any—

A. It did then and does now.

Q. Are there any policies to that effect for services performed outside the State of New Jersey which appear in any of the news releases or in CCH or Prentice Hall?

(p. 99) A. Well, I can't speak to what appears in CCH and Prentice Hall unless your question is specific.

Q. Would you take the Prentice Hall and if there are any in there review them quickly and tell me if you can if there is a statement of policy concerning the taxability of services performed outside the State of New Jersey?

A. Let me see if I understand this. You want me to review this whole section?

Q. No.

MR. KEENAN: Excuse me for one second.

Off the record.

(Discussion held off the record.)

A. What are you looking for?

Q. Directing your attention to CCH, Volume 1, page 6187-3, I believe in the bottom right-hand side of the page. Are those the instructions you just referred to in your testimony?

A. May I see those? Well, this is a later version of the same thing. The one in CCH is a revision dated 6/70, and the one I have in my hand, the actual instructions are dated 5/67.

Q. And the instructions which you refer to in your testimony—

A. Well, to the extent that that item is on the worksheet. Services performed out of New Jersey (p. 100) is in the deductions' worksheet in both instances.

Q. And what are the instructions you referred to in which you said the taxpayer could draw the inference that they were taxable?

A. Well, the simple statement that we have a deduction item for service performed out of New Jersey raises a question in, you know, in my opinion, that any prudent man would say, "Wait a minute, the inference of that is that if I perform taxable services in New Jersey that the tax applies."

Q. That would put him on notice that he should check further into that?

A. In my mind—I am not addressing the question whether the court will see it that way—what I am saying is that in my mind someone responsible for a tax affair of a major corporation would certainly be troubled by that.

Q. This document which you produced, the instructions, the ST-50A form, 5-67 was the one in use in 1967?

A. The ST-50A, yes.

Q. Do you know if that version of the form was published in CCH?

A. At that time?

Q. Yes.

A. I do not. I would assume that it was. That document was filed in the Secretary of the State's Office which is significant in that it gives the force and effect of a regulation.

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FILED
MAY 8 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1506

In The

Supreme Court of the United States

October Term, 1984

AIRWORK SERVICE DIVISION,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE

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COUNTERSTATEMENT OF THE CASE

Airwork Service Division ("Airwork"), has filed a petition for a writ of *certiorari* to have this Court review a decision by the Supreme Court of New Jersey sustaining an assessment imposed under the New Jersey Sales and Use Tax, *N.J.S.A.* 54:32B-1 *et seq.,* by the respondent, New Jersey Director of the Division of Taxation ("Director"). Airwork maintains that the decision sustained an unpublished change in the Director's policy which was retroactively applied against Airwork in violation of the Due Process Clause of the Fourteenth Amendment. This issue was not addressed by the Supreme Court of New Jersey because it was never raised below by Airwork and was raised for the first time before the Supreme Court of New Jersey by an *amicus curiae,* the American Civil Liberties Union. Three parties, Consumer Bureau, the American Civil Liberties Union of New Jersey and the Chamber of Commerce of the United States of America, have filed separate motions with this Court for leave to file briefs as *amici curiae.* This brief is filed in opposition to such motions on the basis that these parties are raising an issue which is not subject to review by this Court since it was never properly raised before the New Jersey state courts.

Airwork is in the business of repairing plane engines for customers. Airwork conducted its repairing services solely in New Jersey for customers located throughout the country. At issue is the taxability of those receipts derived from repairing services performed on plane engines destined for delivery to out-of-state customers following the performance in New Jersey of the taxable services for the period August 12, 1971 to June 30,

1973. Airwork maintains before this Court as the sole basis for review that the assessment imposed against it was contrary to the official policy of the Division of Taxation as reflected in the Commerce Clearing House New Jersey State Tax publication ("CCH"), was changed in 1973 and was thus retroactively imposed upon services performed prior to the alleged change in policy. The three *amici* parties are supporting Airwork's contention that the assessment violated the Due Process Clause on the basis of the purported retroactive application of that policy. The Supreme Court of New Jersey, in a decision dated July 23, 1984 (97 *N.J.* 290, 478 *A.*2d 729 (1984)) (App. *1a), held that, as a matter of state law, the constitutional issue alleging a retroactive application of the sales tax in violation of the Due Process Clause was not properly before the Court since it was never raised by Airwork but rather was briefed for the first time by an *amicus* before the New Jersey Supreme Court.

ARGUMENT

The Motions By The Three Parties For Leave To File Briefs As Amici Curiae Should Be Denied Since The Substantive Due Process Issue Briefed By These Parties Was Not Properly Raised Before The New Jersey State Courts.

The New Jersey Sales and Use Tax, *N.J.S.A.* 54:32 B-1 *et seq.*, imposed a 5% levy for the assessment period

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* The designations "Supp. App." and "App." refer to the supplementary appendix and appendix, respectively, filed by Airwork with this Court in conjunction with its petition for *certiorari*.

in question on the receipts derived from the sale of tangible personal property and the performance of designated services. *N.J.S.A.* 54:32B-3. The Legislature enumerated as taxable services the " . . . maintaining, servicing, repairing tangible personal property not held for sale in the regular course of business. . . ." *N.J.S.A.* 54:32B-3(b) (2). The applicable statute for the period in question made no distinction between taxable services performed on goods destined for out-of-state delivery or goods remaining in New Jersey and clearly taxed the servicing and repairing functions performed by Airwork in this State regardless of the eventual destination of the repaired aircraft engines.

Airwork maintains that it was a mere collector of the tax, that it properly relied on the information published in CCH in not collecting the tax and that the state is thereby prohibited from assessing an allegedly "retroactive" tax under the Due Process Clause. This issue of "unconstitutional unfairness" was never previously raised by Airwork and was raised for the first time before the Supreme Court of New Jersey by the American Civil Liberties Union, participating as an *amicus curiae.*

The New Jersey Supreme Court declined to address this issue, noting that this issue was raised by the American Civil Liberties Union, was not previously considered by the lower courts and was thus not being presented with a sound and complete record to demonstrate the viability of this allegation (Supp. App. 13a). It is well established as a matter of state law than an *amicus* is not a party to an action but merely seeks to advise and assist the court on an issue already part of the litigation. An *amicus* must thus accept the issues previously raised by

the parties and is precluded from injecting new issues not already considered. *Bethlehem Bd. of Education v. Bethlehem Education Association,* 177 *N.J. Super.* 479, 490, 427 *A.*2d 80 (App. Div. 1981); *In re Byram Tp. Bd. of Education,* 152 *N.J. Super.* 12, 18, 377 *A.*2d 745 (App. Div. 1977); *Endress v. Brookdale Community College,* 144 *N.J. Super.* 109, 123, 364 *A.*2d 1080 (App. Div. 1976). Therefore, since Airwork never raised this constitutional issue before any level of the New Jersey courts, the *amici* parties have no legal basis for briefing this issue before this Court.

This Court's jurisdiction to review this case arises under 28 *U.S.C.* § 1257(3), which concerns federal rights and privileges that have been "specially set up or claimed" and upon which there has been a final decision of the state's highest court. As noted, the claim by Airwork of a substantive due process violation was never raised by it in the state courts and is thus not a proper issue before this Court. As noted in *Cardinale v. Louisiana,* 394 *U.S.* 437, 439 (1969),

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio,* 385 *U.S.* 92, 17 *L.Ed.*2d 189, 87 *S.Ct.* 252 (1966), they should be given the first opportunity to consider them.

See also *Moore v. Illinois*, 408 *U.S.* 776, 799 (1972); *Hill v. California*, 401 *U.S.* 797, 805 (1971). Therefore, the federal constitutional issue raised in Airwork's petition should not be considered and thus it is clear that the three motions for leave to file briefs as *amici curiae* should be denied.

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the motions by Consumer Bureau, the American Civil Liberties Union of New Jersey and the Chamber of Commerce of the United States for leave to file briefs as *amici curiae* should be denied.

Respectfully submitted,

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Attorney General of New Jersey
Attorney for Respondent,
Director, Division of Taxation

By: HARRY HAUSHALTER
Deputy Attorney General
Member of the Bar of the
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